89-92

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1989

DAVIS IRON WORKS, INC.,
Petitioner,

vs.

IRVING J. ROSENBAUM,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDICES –

COLEMAN E. KLEIN, P.C.
By: COLEMAN E. KLEIN (P 16035)
Counsel of Record
3000 Town Center, Suite 2500
Southfield, Michigan 48075
(313) 353-5432

Attorney for Petitioner,
DAVIS IRON WORKS, INC.

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

QUESTIONS PRESENTED FOR REVIEW

I

MAY TRUSTEES AND BENEFICIARIES OF EMPLOYEE PENSION PLANS INDEPENDENTLY RESOLVE THEIR DISPUTES OVER ALLEGED PLAN-RELATED ENTITLEMENTS AND ENTER INTO MUTUALLY BINDING RELEASES THEREOF OR MUST THOSE DIFFERENCES BE RESOLVED ONLY IN THE FEDERAL COURTS?

II

WHERE THE LANGUAGE OF AN AGREEMENT IS CLEAR AND UNAMBIGUOUS AND APPLICABLE STATE LAW PROVIDES THAT A COURT MAY PROPERLY ONLY CONSIDER THAT LANGUAGE IN ASCERTAINING THE PARTIES' INTENT, MAY A COURT CONSTRUE THE AGREEMENT CONTRARY TO THAT LANGUAGE?

III

MAY A COURT PROPERLY INQUIRE INTO THE ADEQUACY OF CONSIDERATION FOR A RELEASE WHERE APPLICABLE STATE LAW PROHIBITS SUCH INQUIRY?

IV

IS A RETIRED PARTICIPANT OF A DEFINED BENEFIT PENSION PLAN, WHOSE ENTIRE VESTED BENEFIT HAS BEEN PLACED IN A SEGREGATED ACCOUNT UNDER HIS VIRTUAL CONTROL WITHOUT LIMITATION AS TO WHEN HE MUST COMMENCE MAKING WITHDRAWALS THEREFROM, ENTITLED TO SHARE IN SURPLUS PLAN ASSETS UPON SUBSEQUENT PLAN TERMINATION? IF NOT, DOES HE LACK STANDING TO MAINTAIN AN ACTION THEREFORE?

V

DOES *BRYANT* v. *INTERNATIONAL FRUIT PRODUCTS COMPANY, INC.*, 793 F.2d 118 (6th CIR. 1986), CERT DENIED 479 U.S. 986, 107 S.CT. 576, WHICH THE SIXTH CIRCUIT HOLDS CREATED NEW LAW PRECLUDING CERTAIN PLAN AMENDMENTS PERMITTING REVERSIONS OF EXCESS PLAN ASSETS UPON PLAN TERMINATION, RETROACTIVELY APPLY TO AMENDMENTS, PLAN TERMINATIONS AND REVERSIONS OCCURRING PRIOR TO THAT DECISION?

VI

IS PETITIONER'S PENSION PLAN CONTROLLED BY *IN RE C.D. MOYER COMPANY TRUST FUND*, 441 F.SUPP. 1128 (E.D. PENN. 1977), *AFFIRMED WITHOUT OPINION*, 582 F.2d 1273 (3rd CIR. 1978) AND *WILSON* v. *BLUEFIELD SUPPLY COMPANY*, 819 F.2d 457 (4th CIR. 1987) RATHER THAN BY *BRYANT* v. *INTERNATIONAL FRUIT PRODUCTS COMPANY, INC.*, 793 F.2d 118 (6th CIR. 1986), CERT DENIED 479 U.S. 986, 107 S.CT. 576?

VII

IF A DEFINED BENEFIT PENSION PLAN IS JUDICIALLY DETERMINED TO HAVE BEEN IMPERMISSIBLY AMENDED TO PERMIT A DISTRIBUTION OF SURPLUS ASSETS UPON PLAN TERMINATION TO THE EMPLOYER RATHER THAN TO PARTICIPANTS, SHOULD THE PLAN'S RELATED PRE-AMENDMENT DEFINITION OF THOSE PARTICIPANTS ELIGIBLE TO RECEIVE SUCH A DISTRIBUTION ALSO BE REINSTATED?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Davis Iron Works, Inc., a Michigan corporation. It has no subsidiary or parent corporations.

Respondent is Irving J. Rosenbaum.

The following are third-party defendants interpleaded by Petitioner in the district court; they were not involved in the appeal to the United States Court of Appeals for the Sixth Circuit, whose decision Petitioner herein requests be reviewed:

Sheldon D. Eizen
National Administrative Services of Michigan, Inc.
Austin A. Kanter
Austin A. Kanter, C.L.U. & Associates, Inc.
Jack L. Rosen
Jack L. Rosen, P.C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Davis Iron Works, Inc., respectfully requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit in its case.

OPINIONS AND ORDERS BELOW

The United States Court of Appeals for the Sixth Circuit's Order (June 1, 1989) granting Petitioner's motion to stay issuance of the mandate pending application for writ of certiorari and denying appellee's bill of costs is attached as Appendix A. The unpublished opinion of the

United States Court of Appeals for the Sixth Circuit (decided April 19, 1989), affirming in part and reversing in part the judgment entered by the District Court, is attached as Appendix B. The Amended Memorandum Opinion And Order of the District Court, 669 F.Supp. 813 (E.D. Mich. October 7, 1987) is attached as Appendix C. The Judgment of the District Court (September 21, 1987) is attached as Appendix D. Appendix E is the District Court's Rule 54(b) Certificate (February 25, 1988).

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on April 19, 1989. This petition for certiorari is within ninety (90) days of that day. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the following statutes and regulations, which are set out verbatim in Appendix F:

26 U.S.C. § 401(a)(14)

26 U.S.C. § 402(a)(1)

29 U.S.C. § 1002(7)

29 U.S.C. § 1109

29 U.S.C. § 1110

29 U.S.C. § 1132(a)

29 U.S.C. § 1344(d)(1)

Estate Tax Reg. § 20.2039-2(b), Example (4)

STATEMENT OF THE CASE

(References in parentheses are to the district court's docket entries and related exhibits)

The parties' relationship:

Respondent Irving J. Rosenbaum ("Rosenbaum") was the president, director and majority shareholder of Petitioner Davis Iron Works, Inc. ("Davis") for many years and managed Davis's business affairs. He voluntarily retired on June 8, 1984, at which time he resigned all corporate positions and affiliations. He was never re-employed by Davis nor was there any intention that he return to that employment. The terms of his retirement are reflected in a Stock Redemption Agreement (R. 25: Exhibit C) under which he received $552,000.00 from Davis for his 75% shareholder interest.

The Original Plan:

Davis's original defined benefit pension plan was combined with a trust agreement in one instrument ("Original Plan") (R. 25: Exhibit A), which was qualified under Section 401 of the Internal Revenue Code ("Code"). Rosenbaum was the Original Plan's sole Administrator and Trustee. He was also a participant.

The Original Plan excluded retired employees from its definition of "Participant". (R. 25: Exhibit A, § 1.4; Articles V and VI)

Article XII addressed matters of plan amendment and termination. (R. 25: Exhibit A, Art XII) Trust assets upon plan termination were to be distributed only among the then-employed participants. (R. 25: Exhibit A, § 12.4) The courts below held that Article XII precluded Davis's amending the Original Plan to permit Davis to recover surplus assets upon plan termination.

The Restated Plan:

The Original Plan was restated in 1979 to comply with the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq ("ERISA"). It is hereafter referred to as the "Restated Plan" or "Plan".

Davis was the Plan Administrator (R. 25: Exhibit B, § 3.2), charged with interpreting the Restated Plan and determining all questions arising in its administration and application. The Administrator's determinations were final, conclusive and binding upon everyone unless they were discriminatory or inconsistent with the Restated Plan's tax-exempt qualification under Section 401(a) of the Code or ERISA. The Administrator was also empowered to determine all questions relating to participation and benefit entitlements. (R. 25: Exhibit B, § § 3.5, 7.4, 26.4(f), 28.2)

The Trustee was entitled to demand an acquittance in full satisfaction of all claims against the Plan, the Trustee, the Administrator and Davis upon final payment or distribution to participants pursuant to the Restated Plan's terms. (R. 25: Exhibit B, § 5.6(C))

Rosenbaum was designated by Davis to administer the Restated Plan and also served as Trustee until his retirement. (R. 25: Exhibit B, § 3.2)

The Plan Amendments:

Anticipating retirement, Rosenbaum was informed that the Restated Plan's assets significantly exceeded its obligations. Wishing to allocate most of that excess to himself, he thereupon caused the plan to be amended to increase retirement benefits. (R. 47: Exhibit 5, pp. 9-11)

Rosenbaum also caused another amendment to be adopted, shortly before his retirement, under which certain marketable securities, cash and annuity contracts,

designated by Rosenbaum and equal to what he believed was the value of his then-accrued pension benefit, were segregated for Rosenbaum's exclusive benefit. (R. 47: Exhibit 6, pp. 12-13) Rosenbaum's segregated account was subject only to its own investment experience; it would not be affected whatsoever by the rest of the trust fund. Rosenbaum's successor trustee was obligated under that amendment to fully comply with Rosenbaum's directions concerning his segregated account. Both corpus and income of the segregated account were to be held by the trustee until Rosenbaum unilaterally decided to withdraw them, without any required date that such withdrawals must commence. Davis was contractually obligated not to rescind that amendment without Rosenbaum's consent. (R. 25: Exhibit C, § 10.1)

The latter amendment was presumably motivated by Rosenbaum's desire to indefinitely defer the federal income tax impact upon him personally upon receipt of his pension benefits.[1] The "lump sum distribution" equivalent of that segregation was expressly recognized. (R. 25: Exhibit C, § 10.1)

The Plan's Termination:

Davis terminated the Plan several months after Rosenbaum's retirement. An overfunding was found to exist which ultimately resulted in residual assets of $63,868.00. Davis and the Trustee promptly advised Rosenbaum of those facts. Those funds reverted to Davis in late 1985.

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[1] Although retirement distributions from qualified plans (such as the one involved here) would normally qualify for tax-deferred rollover into an Individual Retirement Account ("IRA"), IRAs were not permitted to hold insurance contracts. One such insurance contract covering Rosenbaum was a substantial asset which he preferred to retain. Rosenbaum apparently intended that the segregated account would thus provide all of the advantages of a rollover IRA with significantly less restrictions.

The Release:

During the termination process Davis discovered that assets in excess of Rosenbaum's accrued retirement benefit had been segregated. Although Davis, the Trustee and Rosenbaum never disputed the proper (lesser) amount of Rosenbaum's accrued retirement benefit which he should have received upon retirement, they disagreed upon the formula to determine the amount which the Plan was entitled to recover from him, since he had enjoyed the use, earnings and appreciation of assets which belonged to the trust for over sixteen months. Rosenbaum also demanded 75% (the percentage of his stock which was redeemed) of the overfunding, asserting that it was a corporate asset which should have been reflected on Davis's books for purposes of computing the redemption price of his stock under the Stock Redemption Agreement. (R. 25: Exhibit C)

Rosenbaum, Davis and the Trustee all wished to resolve those disputes. On November 1, 1985, Rosenbaum, Davis and the Trustee agreed that Rosenbaum could retain $289,767.43 in value of assets then remaining in his segregated account. (R. 25: Exhibit E, ¶ 12) In agreeing to that amount, Davis and the Trustee permitted Rosenbaum to retain more than the amount to which they believed he was entitled in consideration of Rosenbaum's release of all claims except his disputed claim against Davis for an increased redemption price for his stock (measured by 75% of the reversion) under the Stock Redemption Agreement. That release is contained in the Agreement And Statement Of Retired Participant Irving J. Rosenbaum's Distributable Accrued Benefit dated November 1, 1985 (the "Release"). (R. 25: Exhibit E, ¶ 14)

The State Court Action:

Rosenbaum commenced an action against Davis in state court under the Stock Redemption Agreement, alleging that his redeemed shares were undervalued to the extent of 75% of the reversion.[2] Before the state court could rule on Davis's motion to dismiss, however, Rosenbaum filed this federal ERISA action and was permitted to dismiss his state court action without prejudice.

The Dispute:

Rosenbaum claims a portion of the Restated Plan's surplus assets which reverted to Davis upon termination. He alleges that the Restated Plan improperly permitted that reversion since the Original Plan allegedly precluded it and could not be amended in that regard, notwithstanding the Internal Revenue Service's approval of the Restated Plan permitting it and Rosenbaum's own execution of the Restated Plan as Davis's president and the Plan's Trustee. He also contends that his Release violates ERISA and is therefore unenforceable.

Davis contends that Rosenbaum lacks standing to maintain this action, both under ERISA and under the Original Plan, since he was not a "participant" entitled to any benefits at the time of plan termination. Davis further asserts that the reversion is proper because it was expressly permitted under the Restated Plan and alternatively was either not precluded under the Original Plan or, if prohibited, the Original Plan was permissibly amended to allow it. Davis denies that Rosenbaum's Release is unenforceable.

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[2] That action was specifically contemplated by and excepted from the Release.

Federal Jurisdiction in United States District Court:

Federal jurisdiction in the court of first instance was invoked by Respondent under 29 U.S.C. § 1132 (ERISA). Petitioner has challenged that jurisdiction, contending that Respondent lacked standing to maintain this action. Respondent's jurisdictional assertion has thus far been upheld in the courts below.

REASONS FOR ALLOWANCE OF THE WRIT

I

The Release which Rosenbaum signed on November 1, 1985 provided (R. 25: Exhibit E, ¶ 14):

> "14. In consideration of the agreements and undertakings of Davis and the Trust herein contained, Rosenbaum, for himself and his heirs, personal representatives, assigns and all those claiming by, through and/or under any of the preceding, jointly and severally, hereby irrevocably and unconditionally releases, acquits and discharges Davis, the Trust and their respective officers, directors, shareholders, employees, agents and trustees (jointly and severally hereinafter referred to as the 'Releasees') of and from any and all claims, actions and causes of action, however and whenever arising, whether fixed, contingent, liquidated and/or unliquidated, which Rosenbaum, his heirs, personal representatives, assigns and all those claiming by, through and/or under any of the preceding, jointly and severally, now have, ever had or may hereafter have against the Releasees by virtue of Rosenbaum's relationship with the Trust in any and all capacities whatsoever at any time. Nothing contained herein shall

> affect Rosenbaum's rights, if any, against Davis related to Rosenbaum's assertion that he is now and/or may hereafter be entitled to an increase in the redemption price of certain Davis common capital stock once owned by Rosenbaum and redeemed by Davis pursuant to a certain Stock Redemption Agreement between Davis and Rosenbaum dated June 8, 1984 by reason of the reversion of Trust funds to Davis upon termination and liquidation of the Trust, Rosenbaum's aforesaid assertion being hereby expressly rejected by Davis and the Trust."

Rosenbaum clearly, unambiguously and voluntarily released all of his claims against the Plan and Davis under that Release, with the exception of his disputed right against Davis to an increase in the redemption price of his stock under the Stock Redemption Agreement. He does not allege any coercion, misrepresentation or other improper conduct on anyone's part in connection therewith and in fact there was none. He was represented by the same attorney who now represents him in this litigation. He was informed and dealt on equal footing with Davis and the Plan at all times.

The Restated Plan, approved by the Internal Revenue Service, specifically sanctioned participants' releases. (R. 25: Exhibit B, § 5.6(C)) The Sixth Circuit nevertheless held that such a general waiver violated 29 U.S.C. § 1110[3] because the waiver purported to relieve a fiduciary from its responsibilities, obligations and duties under Part IV of Subtitle B of ERISA.

29 U.S.C. § 1110(a) provides, in pertinent part:

> "(a) * * * any provision in an agreement or instrument which purports to relieve a fiduciary

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[3] References to 29 U.S.C. herein are to ERISA.

> from responsibility or liability for any responsibility, obligation or duty **under this part** shall be void as against public policy." [emphasis added]

Apparently recognizing that 29 U.S.C. § 1110 only prohibits releases of fiduciary duties owed **to the plan** under part 4 of Subtitle B of ERISA, *Sulit, Inc.* v. *Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988), Rosenbaum seeks to disguise his action seeking personal gain as one seeking recovery solely for the plan under 29 U.S.C. § 1109.

Walker v. *Mountain States Telephone & Telegraph Company*, 645 F.Supp. 93, 97 (D. Colo. 1986) held:

> "The appropriate ERISA remedy for the alleged breach of fiduciary duty, upon a claim brought by a participant, is for the fiduciary to make good to the plan any losses, not for more benefits to be paid out. *See* 29 U.S.C. § 1109(a)."

The following analysis clearly exposes the fallacy of Rosenbaum's argument. Assume (1) that Davis had not distributed the assets to itself as the employer (or had voluntarily repaid them to the plan) and was presently holding them in the plan, and (2) that Davis nevertheless refused to pay any portion of those assets to Rosenbaum in reliance upon his release. Rosenbaum's argument that he was seeking recovery **for the plan** would be unavailing. He would then be compelled to address the real issue, which is whether Davis's refusal to pay Rosenbaum was a breach of its fiduciary duties **to the plan** under 29 U.S.C. § 1109.

A fiduciary's mishandling of an individual benefit claim does not violate any of the fiduciary duties defined in ERISA. *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134, 142, 105 S.Ct. 3085 (1985).

In *Miller, et. al.* v. *General Motors Corp.*, (6th Cir. 1988, unpublished Opinion No. 87-1493), the Sixth Circuit recently held, at pp. 8-9:

> "* * * Section 410(a) [29 U.S.C. § 1110] is contained in Part IV which pertains to fiduciary duties owned by trustees and administrators to the *plan*. *See* 29 U.S.C. § 1109. Thus, section 410 of ERISA was enacted to preclude a fiduciary from being reimbursed from the employee benefit trust funds for a personal loss incurred by the trustee or administrator as a result of a breach of fiduciary duty. This section does not prohibit an employer from obtaining a release from employees in consideration of a grant of stock." [emphasis by the court].

Uncoerced general releases knowingly signed by an informed employee have been upheld. *Runyan* v. *National Cash Register Corp.*, 787 F.2d 1039 (6th Cir. 1986, en banc). Although *Runyan* was an A.D.E.A. case, its principles persuasively apply to ERISA cases such as the one at bar, particularly its reference to Justice Frankfurter's sanction of releases that encourage "amicable settlement of honest differences . . . where overreaching or exploitation is not inherent in the situation." *Id.*, at 1045. See, also, *Erie Telecommunications* v. *Erie, Pennsylvania*, 853 F.2d 1084, 1101 (3rd Cir. 1988); *Northern Oil Company, Inc.* v. *Standard Oil Company of California*, 761 F.2d 699, 704-706 (E.C.A. 1985) *cert. denied*, 474 U.S. 821, 106 S.Ct. 73, (1985); *Rogers* v. *General Electric Company*, 781 F.2d 452, 454-455 (5th Cir. 1986).

In *Waits* v. *Weller*, 653 F.2d 1288, 1291 (9th Cir. 1981), the Ninth Circuit upheld the validity of a release under ERISA:

> "* * * [C]ourts should encourage equitable settlement of ERISA pension fund cases, just as settlement is encouraged in appropriate class action cases. * * * Regardless of whether the dispute had to be submitted to arbitration or could initially be brought in district court, the parties had the power to settle the case."

The Administrator's interpretation of the Plan and its determinations were conclusive and binding upon all persons; the decision of the Administrator governed and controlled, consistent with the intent of the Plan and ERISA. (R. 25: Exhibit B, § 3.5(A)) The decision of the Administrator on review was final. (R. 25: Exhibit B, § 26.4(f))

In *Hoffa* v. *Fitzsimmons*, 673 F.2d 1345 (D.C. Cir. 1982), the court held that the "finality clause" found in Hoffa's plan served to bind the trustee and administrators as well as Hoffa (the beneficiary) to good faith determinations regarding pension entitlements. *Hoffa*, at 1353. The court concluded that a properly drafted finality clause or comparable provision vesting exclusive power with regard to entitlement or eligibility determinations in the trustee limits judicial review of rulings made under that clause or power. A finality clause can render good faith determination of a trust beneficiary's entitlement binding on both beneficiaries and trustees. *Hoffa*, at 1355.

The court held, at 1356-1357:

> "* * * The only remaining question is whether the commitment to pay the sum contained in the Agreement falls outside the limits on finality clauses imposed under the settled doctrine. As a matter of law, we hold that the commitment in question fell well within those boundaries. The good faith of the parties is manifest, and there has been no evidence adduced suggesting any

> fraud or overreaching. * * * Thus, where parties to a trust intend to reduce to a separate writing their respective rights and obligations, that writing will be honored if not otherwise forbidden under the trust provisions and if entered into in good faith without a showing of fraud or arbitrary action."

The *Hoffa* court further held, at 1357:

> "Given our acceptance both of the validity of agreements between a beneficiary and a trustee determining the beneficiary's trust entitlement, and of the conclusive efficacy of finality clauses, the critical point is that such commitments made by trustees with regard to entitlements may be enforceable regardless of alleged inconsistency with the payment terms of the trust. Thus, in such cases no judicial inquiry is necessary to determine what the trust instrument actually mandates by way of payment. The agreement now governs, not the trust."
>
> * * *
>
> "In like manner, finality clauses serve the important function of frequently averting acrimonious litigation, even if that function was not served in this case."

Hoffa concluded, at 1360:

> "* * * [A]greements between trustees and beneficiaries regarding trust entitlements usually must bind both signatories; that is, neither party can later complain that the amount specified in the agreement is incorrect, at least in the absence of other factors militating against enforcement. In this case, Hoffa, relying on the computation by the Plan's actuary of the amount owed him by the

> Plan, accepted the warranties and escrow provisions based on that computation. The district judge properly observed that appellants' pre-existing duty to pay Hoffa was 'superceded' by the warranties made in the instrument. In a like fashion, the district judge might have noted that Hoffa, too, was bound by that calculation. Thus, Hoffa, in entering into the Agreement, surrendered the right subsequently to demand payment under the Plan according to his own computation of the benefits to which he was entitled. * * * We thus have no doubt of the presence of consideration to support the Agreement."

Similarly, Rosenbaum's settlement and release of all claims and causes of action against Davis and the Plan in consideration of their permitting him to retain assets in excess of those to which they believed he was entitled bars him from maintaining this action.

The decisions of the courts below conflict, inter alia, with this Honorable Court's decision in *Massachusetts Mutual, supra,* and the above-cited decisions of the District of Columbia, Third, Fifth, Eighth, Ninth and E.C.A. Circuits. This important federal question is believed to be one of first impression before this Court. It should now be settled, in order to provide uniformity of pension plan administration throughout the United States as well as to confirm that good-faith, uncoerced and knowledgeable private settlements of questions concerning pension plan entitlements will be respected, without the necessity in every case of instituting litigation in the federal courts.

II

The Sixth Circuit found that "[i]t would certainly appear, considering the language of the release, that

Rosenbaum waived **all claims, present and future,** as to the trust". (emphasis added) It nevertheless held that "* * * the release only applied to the claim concerning the overpayment of funds to [Rosenbaum], not to any future claims as to residual assets". Such a contrary interpretation violates the well-established legal principle that, where the language of an agreement is clear and unambiguous, a court may properly only consider the unambiguous language as expressed in the agreement in ascertaining the parties' intent. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest. *Michigan Chandalier Co.* v. *Morse*, 297 Mich 41, 49, 297 N.W. 64 (1941); *Grzebik* v. *Kerr*, 91 Mich App 482, 486-487, 283 N.W.2d 654 (1979); *Moore* v. *Campbell Foundry*, 142 Mich App 363, 367, 369 N.W.2d 904 (1985), *lv den* 424 Mich 891 (1986).

The courts below therefore erred when they refused to apply the Release's clear and unambiguous provisions to bar Rosenbaum's action. They are in conflict with the decisions of the Supreme Court of Michigan as applied to Michigan contracts and should be reversed.

III

The courts below inquired into the adequacy of the consideration received by Rosenbaum for his release agreement and found it insufficient. The District of Columbia Circuit, in construing and enforcing the terms of a substantively identical agreement concerning another Michigan ERISA-regulated pension plan, held that "in Michigan, detriment to the promisee constitutes valid consideration even if there is no benefit to the promisor." *Hoffa* v. *Fitzsimmons*, 673 F.2d 1345, 1360 (D.C. Cir. 1982). In the instant case, Rosenbaum acknowledged that he received consideration from Davis and the Trust for his release.

The decisions of the courts below are thus in conflict with the decisions of the District of Columbia Circuit and of the Supreme Court of Michigan as applied to Michigan contracts and should accordingly be reversed.

IV

Rosenbaum purports to maintain his action in his capacity as a participant of the Plan pursuant to 29 U.S.C. § 1132(a), under which he alleges that the district court possesses subject matter jurisdiction.

29 U.S.C. § 1002(7) defines a "participant" as

> "Any employee or former employee of an employer or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan."

Rosenbaum voluntarily retired and terminated his employment with Davis in June, 1984; he was never re-employed by Davis nor was there any intention that he return to that employment. Upon retirement, he selected trust assets equal to what he then believed was the present value of the lump sum equivalent of his entire accrued retirement benefits and caused them to be segregated in a self-directed trust account[4] several months before the Plan's termination. The segregated account was unaffected by and insulated from the rest of the trust fund. He possessed the absolute right to direct the management of those assets and could unilaterally compel their distribution to himself whenever he wished. The "lump sum distribution" equivalent of that segregation was expressly recognized. (R. 25: Exhibit C, § 10.1)

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[4] In fact, more than that value was erroneously segregated (and subsequently returned to the Plan).

Congress intended that retirement benefits be available, and therefore taxed, at a time when they were generally needed most: when one retired and stopped working. Presumably concerned that the more affluent might not need their benefits at that time and might seek to delay the taxation of those benefits, Congress mandated that benefits be distributed, and thus be taxed, within a certain time, regardless of economic necessity. 26 U.S.C. § 401(a)(14).

Prior to the Economic Recovery Tax Act of 1981, P.L. 97-34 ("ERTA"), the doctrine of constructive receipt caused many pension plans to require participants to elect, prior to the earlier of their attainment of retirement age or termination of employment, to accept significant economic restrictions on their otherwise unrestricted right to receive their pensions at the earlier of those dates in order to defer income taxation until a pre-determined later time.

ERTA obviated the need for those restrictions by generally eliminating constructive receipt principles for income tax purposes when it amended 26 U.S.C. § 402(a)(1). ERTA did not eliminate constructive receipt so as to permit a participant to indefinitely defer the receipt, and thus the income taxation, of benefits for as long as he or she wished, however. *See*, 26 U.S.C. § 401(a)(14); Rev. Rul. 89-52, I.R.B. 1989-15; IRS Notice 82-3, 1982-1 CB 353, 355, Section III; T.I.R. No. 1334, M-2, 1/8/75; Rev. Rul. 72-241, 1972-1 CB 108; 1 Commerce Clearing House Pension Plan Guide, Paragraph 2609, pp. 4367-4368. And it did not eliminate it at all for estate and gift tax purposes. 1 Commerce Clearing House Pension Plan Guide ¶ 311, p. 1604. *See, also*, Estate Tax Reg. § 20.2039-2(b), Example (4).

The Restated Plan observed the aforesaid statutory benefit commencement provisions by requiring early-

retiring participants wishing plan-authorized deferral of the commencement of their benefits to notify Davis prior to such early retirement and specify a definite benefit commencement date consistent with the Plan's adherence to ERISA. (R. 25: Exhibit A, § 12.1) Rosenbaum made no such election, however. Instead, upon the occurrence of both early retirement and termination of employment, he immediately segregated assets equal to the lump sum equivalent of his accrued benefits in an account over which he exercised exclusive control until **he alone** decided when to withdraw them. (R. 1: Complaint, ¶ 12; R. 24: Brief in Support of Plaintiff's Motion for Summary Judgment, p. 6) Rosenbaum could thus attempt to defer federal income taxes unfettered by Congress's benefit distribution prescriptions. Code Section 401(a)(14), supra.

If this Honorable Court agrees with Rosenbaum, it will create an enormous loophole through which federal income tax may be deferred to a date of taxpayer's, rather than Congress's, choosing.

There is no sound public policy warranting the extension of ERISA standing to one in Rosenbaum's position while denying it to one in virtually identical circumstances who has received the more traditional lump sum distribution. In both cases, their economic benefits have been totally secured under their absolute control and the employers' and plans' fiduciary obligations discharged. No viable distinction for diverse treatment exists.

A former employee whose accrued benefits under a plan have already been distributed in a lump sum is not "eligible to receive a benefit" and is thus not a participant. *Kuntz* v. *Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986); *Yancy* v. *American Petrofina, Inc.*, 768 F.2d 707, 708-709 (5th Cir. 1985); *Saporito* v. *Combustion Engineering*, 843

F.2d 666, 671 (3rd Cir. 1988); *Joseph* v. *New Orleans Electrical Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir. 1985), *cert. denied* 474 U.S. 1006, 106 S.Ct. 526 (1985); *Walker* v. *Mountain States Telephone and Telegraph Company*, 645 F.Supp. 93, 95-97 (D. Colo. 1986).

Former employees have standing only if they have a colorable claim to "vested benefits". *Firestone Tire and Rubber Co.* v. *Bruch*, _____ U.S. _____, 109 S.Ct. 948, 958 (1989).[5] The term "vested benefits" refers to accrued benefits determined under the plan's benefit formula; they do not extend to surplus assets after vested benefits are provided for. *Chait* v. *Bernstein*, 835 F.2d 1017, 1021, 1022 (3rd Cir. 1988); *Blessitt* v. *Dixie Engine*, 848 F.2d 1164, 1173 (11th Cir. 1988, en banc).

The courts below therefore erred when they considered the Plan's surplus assets upon termination, if recoverable by the Plan, as an additional accrued benefit to which Rosenbaum would be entitled and had not yet received, thus continuing his participant status. Their decisions thus conflict with this Honorable Court's decision in *Firestone* and the above-cited decisions of the Third, Fourth, Fifth, Ninth and Eleventh Circuits and should be reversed.

V

The Sixth Circuit held herein that *Bryant* v. *International Fruit Products Company, Inc.*, 793 F.2d 118 (6th

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[5] The Sixth Circuit acknowledged Rosenbaum's concession that Davis was not estopped from maintaining that Rosenbaum was not a participant although he was included in certain of the Plan's trust returns filed after plan termination. Davis had explained in the courts below that Rosenbaum was reflected therein (for reporting purposes only) as a *former* participant whose lump sum distribution was nominally being held by the trustee in Rosenbaum's aforesaid segregated account.

Cir. 1986), *cert denied* 479 U.S. 986, 107 S.Ct. 576, created new law and that Rosenbaum's reliance on pre-*Bryant* law at the time he caused Davis to amend the original plan to permit a reversion of surplus assets to Davis **was not** improper. Yet it also held that Davis's reliance on the same pre-*Bryant* law at the time it accepted the reversion in final termination of the plan — more than one year before the *Bryant* decision — **was** improper. In applying an apparent double standard, the Sixth Circuit retroactively applied *Bryant* to a fully completed pre-*Bryant* plan termination. It thus wholly upsets the reasonable expectancies of not just Davis but of all employers in the Sixth Circuit whose plans allegedly contain *Bryant*-type language and who terminated those plans and obtained reversions of surplus funds in reliance upon the law in effect at that time. Permitting the reopening of settled plan terminations, the propriety of which have previously been approved by the Internal Revenue Service, by retroactively creating a new cause of action, is inherently inequitable. The propriety of such retroactivity involves a significant federal question which has not been, but should now be, settled by this Honorable Court.

VI

29 U.S.C. § 1344(d)(1) deals with the distribution of "residual" assets:

> "(d) Distribution of residual assets; remaining assets
>
> (1) Any residual assets of a single-employer plan may be distributed to the employer if —
>
> (A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and
(C) the plan provides for such a distribution in these circumstances."

It is undisputed that Subparagraphs (A) and (B) have been satisfied in the instant case; the narrow issue presented is whether Subparagraph (C) has also been satisfied. In order to determine whether the plan provides for such a distribution, it is necessary to review the Original Plan in its entirety. Each case of this kind is controlled by the language of the documents creating the particular plan involved. *Bryant* v. *International Fruit Products Co., Inc.*, supra, at 123. In construing that language, it is important to avoid "the not uncommon error of reading technical pension language as if it were ordinary English speech." *Chait* v. *Bernstein*, 835 F.2d 1017, 1023 (3rd Cir. 1988). A review of the Original Plan is the first step.

A. "Contributions" Defined

Participants' retirement benefits were defined with precision. (R. 25: Exhibit A, Article III) Davis was to make annual contributions to the Trustee. The plan provided that "no funds contributed to this trust nor assets of the trust shall ever revert to or be made available to the Employer." (R. 25: Exhibit A, § 12.1(c))

Original Plan Sections 7.1, 8.1, 1.13 and Article III, read together, clearly provided the mechanism by which Davis's contributions were required to be reduced to preclude overfunding. It was for that reason, therefore, that the Original Plan provided that all contributions would be irrevocable. (R. 25: Exhibit A, § 7.4)

In Re C.D. Moyer Company Trust Fund, 441 F.Supp. 1128 (E.D. Pa. 1977) *affd without opinion*, 582 F.2d 1273 (3rd Cir. 1978) permitted the employer to recover the overfunded portion of its defined benefit pension plan notwithstanding a prohibition against any amendment allowing any reversion of "trust corpus or income" to the employer. *Moyer* defined the phrase "trust corpus or income" to include "only so much of the funds as were necessary to insure full payment of the plan's obligations to the participants". 441 F.Supp., at 1132.

The general scheme and intent of the Original Plan was to restrict (and thereby define) "contributions" to that minimum amount required to provide accrued benefits. Just as *Moyer*, supra, contemplated the "trust fund" as including only those assets needed to fund accrued benefits, the Original Plan similarly contemplated "contributions" as including only so much of those payments as was minimally necessary to provide accrued benefits.

Any prohibition against a reversion of "contributions" in the Original Plan would thus not preclude a refund of so much of Davis's payments to the Plan as exceeded the Plan's minimum funding requirements.

B. Amendment Provisions

The Original Plan provided in pertinent part (R. 25: Exhibit A, Article XII AMENDMENT AND TERMINATION):

> "12.1 **The Employer by action of its Board of Directors may amend this trust at any time, or from time to time,** as evidenced by an instrument in writing executed in the name of the Employer by a duly authorized officer under the corporate seal of the Employer **provided, however:**

(a) **No amendment shall** deprive any participant, retired participant, terminated participant or any beneficiary of any of the benefits purchased by previous contributions to the trust to which he is entitled.

(b) **No amendment shall** provide for the use of trust funds for any purpose other than for the benefit of the participants and their beneficiaries.

(c) No funds contributed to this trust nor assets of the trust shall ever revert to or be made available to the Employer.

(d) **No amendment shall** be effective until an instrument executed as above provided is delivered to and accepted by the Trustee." (emphasis added)

Subsection (a) tracks ERISA's requirement that no accrued benefits may be reduced. Subsection (b) is comparable to Article XI § 1 of the plan in *Washington-Baltimore Newspaper Guild Local 35* v. *Washington Star Company*, 555 F.Supp. 257, 258 (D.D.C. 1983), *aff'd without opinion*, 729 F.2d 863 (D.C. Cir. 1984), which "did nothing more than prohibit diversion to any purpose other than for the exclusive benefit of participants." *Bryant, supra*, at 123.

Subsection (c), unlike subsections (a), (b) and (d), significantly does not contain the prefatory phrase "No amendment shall". That pregnant omission cannot simply be attributed to drafting oversight or dismissed as insignificant.

There was nothing in subsection (c) mandating reference to the other subsections of that same section which included the prefatory phrase "no amendment shall".

Washington Star, supra, at 261 Thus, the "no amendment shall" language cannot permissibly be incorporated into subsection (c). In view of the requirement to reduce contributions to the minimum amount necessary to provide the participants' required benefits, subsection (c) simply assured that the trust would not become underfunded.

Even if section 12.1 were considered in isolation without regard to the remaining provisions of the Original Plan, the absence of the "No amendment shall" prefatory language in subsection (c) reasonably supports the Plan Administrator's and Trustee's interpretation that subsection (c) could be amended. The lower courts' findings that subsection (c)'s inclusion in Article XII entitled "Amendment and Termination" obviated the necessity of the omitted "no amendment shall" language found in the other subsections failed to explain why that language was nevertheless employed in the other subsections or why the Plan Administrator's and Trustee's aforesaid interpretation was arbitrary, capricious, made in bad faith or otherwise contrary to law.

The Administrator was provided broad discretion under the Plan to interpret its provisions and determine all questions concerning its administration, application, participation and benefit entitlements. (R. 25: Exhibit B, §§ 3.2, 3.5, 7.4, 26.4(f), 28.2) A trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable. *Firestone Tire & Rubber Co., et al.* v. *Bruch, et al.*, _____ U.S. _____, 109 S.Ct. 948, 954 (1989). See, also, *Daniel* v. *Eaton Corporation*, 839 F.2d 263, 267-268 (6th Cir. 1988).

In *McHugh* v. *Teamsters Pension Trust Fund of Philadelphia*, 638 F.Supp. 1036, 1041 (E.D. Pa. 1986), the court held:

> "A plaintiff who challenges a denial of benefits by the trustees of an employee benefit plan must establish that the trustees' decision was arbitrary and capricious. [citations omitted] The trustees' interpretation of plan provisions 'should be upheld even if the court disagrees with it, so long as the interpretation is rationally related to a valid plan purpose and not contrary to the plain language of the plan.' [citation omitted]"

The Administrator and Trustee reasonably interpreted Davis's plans in a rational relationship to their purpose, consistent with their terms. Their interpretation should be respected.

The courts below also concluded that the Original Plan precluded an amendment permitting a reversion because its restriction was comparable to the amendment prohibition in *Bryant, supra.*

Bryant involved two restrictive plan sections: "Section 5.3 **In no event and under no circumstances** shall any contributions to this Trust by the Employer, nor any of the Trust Estate or the income therefrom, revert to or be repaid to the Employer; * * *" and "Section 13.1 * * * **no such amendment** shall cause or permit any part of the Trust Estate to revert to or be repaid to the Employer * * *." (emphasis added) *Bryant, supra,* at 120, 122.

Bryant focused on the absolute language "in no event and under no circumstances" which it observed was "not standard pension language mandated by the Internal Revenue Code" and went far beyond the requirements of 26 U.S.C. § 401(a). *Bryant* held that such atypical language precluded an amendment permitting a recovery of contributions. *Bryant, supra,* at 123. That language does not exist in Davis's plans. Neither does the language "no such amendment" appear in subsection (c) as it did in *Bryant.*

The *Bryant* plan provided that there could be no reversion of "* * * any **contributions** to this Trust by the Employer, nor any of the **Trust Estate** or the **income** therefrom * * *." (emphasis added) *Bryant, supra,* at 120. The courts below relied on *Bryant's* observation that the term "contributions" included surplus assets arising from actuarial error since they originated as "contributions". *Id.* at 123.

The *Bryant* plan on that point is significantly distinguishable from the Original Plan in at least two material respects: (1) the *Bryant* plan apparently did not intend to define "contributions" as only including those funds minimally required to fund benefits, as the Original Plan did; and (2) the *Bryant* plan also specifically precluded a reversion of trust **income,** unlike the Original Plan which did not. Davis's surplus assets may well have consisted of trust income, which could have reverted.

Wilson v. *Bluefield Supply Company,* 819 F.2d 457 (4th Cir. 1987) carefully reviewed the anti-diversion language in effect under the Code and Treasury Regulations prior to ERISA which was required to be incorporated in all qualified plans and held that such language was not intended as a limitation on the employer's power to amend a plan to provide for distribution of the residual assets. *Wilson* observed that a reversion was permissible even without an express reservation of that right in the plan. *Wilson, supra,* at 464-465.

Wilson also critically reviewed other landmark cases involved in this very recently developing area of ERISA, notably *Audio Fidelity Corp.* v. *Pension Benefit Guaranty Corp.,* 624 F.2d 513 (4th Cir. 1980); *Washington Star Company, supra;* and *Pollock* v. *Castrovinci,* 476 F.Supp. 606 (S.D.N.Y. 1979), *aff'd without opinion,* 622 F.2d 575 (2d Cir. 1980). The *Wilson* court distinguished

its earlier decision in *Audio*, *supra*, (which precluded a reversion of residual assets) on two grounds, at 462:

> "* * * First, we held that the limitation in the amendment provision quoted above expressly prohibited Audio from amending the plan to add the residual assets amendment. Second, we held that 'ERISA afforded Audio no basis for altering the substantive terms of the plan after its termination.' 624 F.2d at 517."

The "no amendment shall" language in *Audio* does not appear in Davis's Original Plan Section 12.1(c). Davis's reduction of contributions mechanism does not exist in *Audio*. Finally, *Audio*'s reversion amendment was adopted *after* termination whereas Davis's was adopted many years before. *Audio* is thus distinguishable from Davis.

The situation presented in the instant case is unlike the situation presented in *Bryant*. A careful, analytical analysis of *Bryant*'s rationale is necessary to avoid tarring plans with superficially similar language with *Bryant*'s unusual provisions.

For the foregoing reasons, Davis's Restated Plan permitting a reversion of residual assets upon termination is lawful and should be upheld. The decision of the Sixth Circuit thus conflicts with the above-cited decisions of the District of Columbia, Second, Third and Fourth Circuits, which apply to plans such as Davis's. Its decision should accordingly be reversed.

VII

The Original Plan provided (R. 25: Exhibit A, § 12.4):

> "Upon termination of the trust any assets of the trust, other than contracts issued on the lives

> of participants, shall be distributed among the **then** participants in proportion to the attained cash values upon contracts then outstanding on the lives of such participants." (emphasis added)

The Original Plan defined "Participant", in pertinent part (R. 25: Exhibit A, § 1.4):

> "* * * Participant shall **not** include * * * any employee who shall have been retired hereunder." (emphasis added)

The preceding two sections were eliminated when the Restated Plan was adopted because they were unnecessary; the Restated Plan provided that surplus assets should revert to the employer upon plan termination. The Sixth Circuit held that the Restated Plan's provision for a reversion to the employer of surplus assets upon plan termination was impermissible. It thereupon reinstated Original Plan Section 12.4, supra, but not the necessary definition of participant referred to therein, which was contained in Original Plan Section 1.4. Instead, it relied upon the Restated Plan's definition of participant, which never contemplated, nor was intended to permit, distributions of surplus assets to anyone other than the employer.

As a result, Rosenbaum, although then a retired employee, was permitted to materially share in the surplus to the significant detriment of employed participants at the time of plan termination.

Assuming, arguendo, that the Sixth Circuit correctly held that the reversion amendment was impermissible, its refusal to also reinstate the Original Plan's companion definition of participant was legally inconsistent and highly prejudicial to the employed participants.

This interpretation of ERISA has never been considered by any other court to the best of Petitioner's knowledge and should now be resolved by this Honorable Court to reverse that injustice.

SUMMARY

This petition presents many significant issues affecting the proper administration of ERISA employee benefit plans. Petitioner respectfully submits that participants, beneficiaries, employers and trustees who are unavoidably but nevertheless conscientiously caught up in the complexities of those plans should at least be permitted to confidently resolve their benefit entitlement disputes evenhandedly and in good faith without fear that those resolutions will be set aside. Lacking such confidence, many will insist upon a definitive resolution of their dispute in the federal courts. Congress did not intend to abolish uncoerced settlement releases and they should be encouraged in the Sixth Circuit as they are in other circuits.

Concern for the rights of participants is clearly legitimate, given the potential for overbearing conduct on the part of presumably powerful employers and trustees. The courts should properly redress abuses when they find them. And there are established legal principles, notably in the laws of contracts and trusts, with which to do so. But precluding all releases because some may be tainted is like throwing the baby out with the bath water, at great emotional and financial cost to those who must deal with ERISA's complexities, like it or not.

Being required to pursue the judicial process to definitively resolve disputes that could (and should) be amicably settled privately will undoubtedly result in

significant increases in the expense of trust administration. Of perhaps greater concern, however, is the likelihood of substantial delays in benefit payments to participants because prudent fiduciaries may fear that any mutual settlement which might otherwise be reached may later be set aside by a judge, should a participant later become disenchanted, notwithstanding an absence of coercion or other improper fiduciary conduct.

The decision of the Court of Appeals on this issue, as well as its rulings on the other issues presented in this petition, if allowed to stand, will have a significant adverse effect not only upon this Petitioner but potentially upon many other employee benefit plans and those who either depend upon them or administer them.

For the reasons presented herein, Petitioner prays that this Honorable Court grant its petition for certiorari.

Respectfully submitted,

By: /s/ COLEMAN E. KLEIN(P16035)
Counsel for Petitioner
Member of the United States and
Michigan Supreme Court Bars
3000 Town Center, Suite 2500
Southfield, Michigan 48075
(313) 353-5432

Dated: July 17, 1989

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

ORDER GRANTING STAY OF MANDATE

(United States Court of Appeals — Sixth Circuit)

(Filed June 1, 1989)

(IRVING J. ROSENBAUM, Plaintiff-Appellee, vs. DAVIS IRON WORKS, INC., Defendant-Appellant, SHELDON D. EIZEN, ET AL., Third Parties-Defendants — NO. 88-1245)

Upon consideration of the appellant's motion to stay issuance of the mandate pending application for writ of certiorari and the response of the appellant in opposition to appellee's bill of costs,

It is **ORDERED** that the motion be, and it hereby is, **granted**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

APPENDIX B

OPINION
NOT FOR PUBLICATION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

(United States Court of Appeals – Sixth Circuit)

(Filed April 19, 1989)

(IRVING J. ROSENBAUM, Plaintiff-Appellee, v. DAVIS IRON WORKS, Defendant-Appellant — No. 88-1245; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN)

BEFORE: **MILBURN** and **BOGGS**, Circuit Judges; and **CONTIE**, Senior Circuit Judge.

PER CURIAM.

Appellant Davis Iron Works (Davis) appeals the decision of the district court granting summary judgment to plaintiff-appellee Irving J. Rosenbaum. Rosenbaum sued to recover, under the Employees Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, a pro rata share of the overfunding of Davis's defined benefit pension plan. The court below awarded Rosenbaum a pro rata share of $63,868, amounting to $43,832.07. Rosenbaum was also awarded attorney's fees, amounting to approximately $10,000. Except for the award of attorney's fees, we affirm the judgment entered by the district court.

I

This dispute concerns two pension plans implemented by Davis. From the early 1960s until his resignation on June 8, 1984, Rosenbaum was the majority stockholder and president of Davis. In 1967, under the direction of Rosenbaum, Davis established a pension plan (Original Plan) to cover its eligible non-union employees. Under this plan, Davis agreed to purchase annuity contracts for the covered employees. These contracts would produce a defined monthly pension upon the employee's retirement. The plan stated that "All amounts contributed by the Employer to the Trustee shall represent irrevocable contributions of the Employer to this trust."

While the plan stated that Davis could amend the plan at any time, the plan also stated that "No amendment shall provide for the use of trust funds for any purpose other than for the benefit of the participants and their beneficiaries." It also stated that "No funds contributed to this trust nor assets of the trust shall ever revert to or be made available to the Employer." Finally, the plan provided that "Upon termination of the trust any assets of the trust, other than contracts issued on the lives of participants, shall be distributed among the then participants in proportion to the attained cash values upon contracts then outstanding on the lives of such participants."

In 1979, after the passage of ERISA, the Original Plan was reframed in its entirety in order to comply with that legislation. This Amended Plan was again established under the direction of Rosenbaum, and he became the plan's trustee. Subsection 22.2(E) of the plan provided that "In the event there are assets of the Trust Fund remaining after the allocation under Subsection 22.2(D), the remaining assets shall be returned to the Corporation."

On June 8, 1984, Rosenbaum retired from his position as president of the company and trustee of the plan. Davis and Rosenbaum signed a stock redemption agreement in which Davis purchased Rosenbaum's 75% share of the company's stock. On the date of the signing of this agreement, both sides executed a mutual release of claims concerning the agreement. Rosenbaum elected, as permitted under the plan, to have the cash equivalent of his accrued benefits in the Plan transferred to a separate account to be held by the Plan until he decided to withdraw them. The money in this account was to be invested as directed by Rosenbaum, and the proceeds of the investments were to go into the account.

On October 5, 1984, Davis terminated the plan. On March 24, 1985, before the Plan participants were paid, Davis notified Rosenbaum that the Plan had miscalculated his benefits and overpaid his account by $65,324. Davis insisted that Rosenbaum return the excess to the Plan. Rosenbaum disputed the amount of the overpayment. On November 1, 1985, Rosenbaum, Davis, and the Plan settled the dispute and signed an agreement defining the plaintiff's benefits (the "release"). In consideration for Davis's agreement to a pay a compromise amount, Rosenbaum agreed to release his claims against Davis, specifically exempting a claim against Davis for an increased redemption price for his stock due to an overfunding of the plan. At this point, both parties knew there was some overfunding of the plan, but neither knew the extent of the overfunding.

On November 21, 1985, Davis received the first portion of the excess assets of the plan. On December 24, 1985, Davis received the balance of the assets pursuant to Subsection 22.2(E) of the Amended Plan. In July 1986, Rosenbaum filed a claim in state court alleging that his redeemed shares were undervalued to the extent

of 75% of the reversion. This claim was the one specifically reserved in the release. In January 1987, however, Rosenbaum filed this action asking for a pro rata share of the reversion. (The state court agreed to dismiss the stock redemption claim without prejudice.) Both sides in this action filed motions for summary judgment. In September 1987, the court below granted summary judgment to the plaintiff on his claim and also dismissed counterclaims filed by the defendant.[1] *Rosenbaum* v. *Davis Iron Works*, 669 F. Supp. 813 (E.D. Mich. 1987). This appeal followed.

II

Davis first contends that Rosenbaum lacks standing to maintain this action because he had already received all his benefits from the Plan before the residual assets were discovered. Davis argues that the segregation of Rosenbaum's assets from the Plan into a separate account constituted a constructive receipt of the benefits, disqualifying Rosenbaum from maintaining this suit. In support of this doctrine of constructive receipt, Davis looks to Federal tax law on when benefits received pursuant to ERISA pension plans are taxable.

In order to maintain an action under ERISA, one must be a considered a [*sic*] participant under the plan. 29 U.S.C. § 1002(7) defines a participant as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan. . . ." A former employee whose accrued benefits under a plan have already been distributed in a lump sum is not "eligible

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[1] The dismissal of the counterclaims has not been appealed.

to receive a benefit" and thus is not a participant under ERISA. *Kuntz* v. *Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986).

Davis argues that, at the time of the reversion, Rosenbaum had already retired and received his benefits. The fact that he chose to keep his benefits in a segregated account maintained by the trust does not affect the fact that he already received his benefits. The account, while maintained by the trust, was invested at the direction of Rosenbaum. In order to receive his money, he had only to ask that the distribution be made. This control shows, according to Davis, that he constructively received his benefits.

Davis claims that the treatment of these benefits under Federal tax law supports its constructive receipt theory. Prior to 1981, § 402 of the Internal Revenue Code treated these benefits as being received for tax purposes. However, as Rosenbaum points out, this section was amended in 1981 to read that only benefits that are actually distributed are taxed. Davis claims that while the change in the law did allow the delay of taxation of benefits by pension recipients, this change did not mean that the recipient could delay the distribution of his benefits as long as he wants. The intention of the law was to allow recipients to tell the administrators of the pension plan when they wished their benefits distributed, and the benefits would be distributed at that later date. In the present case, Rosenbaum did not set any date that his assets were to be released; under the provisions of the plan, he could delay distribution as long as he wanted. Under this kind of scheme, Davis argues, Rosenbaum should be considered to have received his benefits.

Davis argues that if the law is not interpreted in this manner, a massive tax loophole will have been created that Congress did not intend to create. In any event, the issue here, Davis argues, is whether Rosenbaum should be accorded standing under ERISA to sue for a reversion of assets after he received all the benefits due him under the plan. Davis argues that it makes no sense to allow Rosenbaum standing in this case and not allow it to those people who received their benefits in a lump sum.

We are not persuaded. Even if Davis were correct as to the tax treatment of Rosenbaum's benefits, it would not be dispositive of the issue in this case. In any event, it is not at all clear that Davis is correct. The language of the statute seems to support Rosenbaum. Section 402(a)(1) of the IRS Code states, in pertinent part, that "the amount actually distributed to any distributee by an employees' trust . . . shall be taxable to him, in the year in which so distributed." It is undisputed that Rosenbaum's benefits were not distributed to him until November 1985, well after the termination of the plan. Thus, one can argue that, using Davis's own analogy, Rosenbaum had not yet received his benefits and was a participant in the fund.

In addition, it is our view that the *Kuntz* rule disallowing suits by non-participants is inapplicable in this case. In *Kuntz*, the plaintiff, who had clearly received his benefits, sought damages for a breach of fiduciary duty under ERISA. He, therefore, was not seeking a benefit from a plan, as a participant would, but rather was seeking monetary damages. In the present case, however, Rosenbaum is seeking a benefit under the plan, not damages for a violation of a fiduciary duty. Even someone who has ostensibly received all his benefits should be able to sue in a case such as this because the suit is for benefits the claimant was allegedly entitled to under the

plan. Any other ruling would allow plan administrators to take benefits from plan recipients and then become immune to suit by paying beneficiaries some of the benefits to which they were entitled, while falsely representing that the amount paid was the full amount of the benefits due.

This kind of analysis was approved in a recent decision by the Ninth Circuit, the court that decided *Kuntz*. In *Amalgamated Clothing & Textile Workers Union et al.* v. *Murdock et al.*, 861 F.2d 1406 (9th Cir. 1988), the court held that a plaintiff who had already received his benefits could maintain an equitable action for a breach of fiduciary duty. The court concluded: "A fiduciary should not be allowed to keep ill-gotten profits simply because plan participants and beneficiaries have been paid their actuarially vested plan benefits." *Id.* at 1418. This conclusion is also supported by the recent Supreme Court decision in *Firestone Tire and Rubber Co.* v. *Bruch*, 109 S.Ct. 948 (1989). In that case, the Court held that a plaintiff can be considered a participant under the act for purposes of maintaining an action against the plan administrator if he has a 'colorable claim' to benefits. *Id.* at 958. Thus, a plaintiff in this type of case should be treated as a participant if he has a colorable claim to benefits under the plan.[2] Rosenbaum clearly has such a claim. We therefore conclude that Rosenbaum should be treated as a participant and, hence, has standing to sue.

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[2] We note, as pointed out by the court below, that Davis itself considered Rosenbaum a participant in three corporate documents issued after the segregation of Rosenbaum's assets. Rosenbaum concedes that these documents do not estop Davis from maintaining he is not a participant, but they do at least rhetorically support his position.

III

Davis next argues that Rosenbaum is not eligible to receive benefits because he was not a participant as defined by the Original Plan at the time of the discovery of the residual assets. That plan required a participant to be a current employee. The Amended Plan, like ERISA, however, does not exclude a retired employee from being a participant.

Davis argues that if, as the district court held, the Amended Plan's provision that all residual assets go to Davis is inoperative, its definition of participant, at least as it pertains to the distribution of these assets, should be as well. Rosenbaum should not be able to enforce only those parts of each plan that suit his interest.

We reject this contention. The Original Plan allowed all amendments, except for changes to provisions concerning the distribution of surplus assets. The Amended Plan is thus perfectly valid; only the one amendment challenged is void. The rest of the plan, including the definition of participant, remains valid. Rosenbaum can mantain his suit.

IV

Davis next argues that the November 1, 1985 release of claims signed by Rosenbaum barred his claim. Davis contends that this release was a general waiver of all of Rosenbaum's claims concerning the residual assets of the Plan, with the exception of an action seeking an increased return for his redeemed stock based on the increased value of the shares due to the residual assets. The language of the release on which Davis relies reads: "In consideration of the agreements and undertakings of Davis and the Trust herein contained, Rosenbaum . . .

hereby irrevocably and unconditionally releases, acquits, and discharges Davis, the Trust . . . of and from any and all claims, actions, and causes of action, however and whenever arising, whether fixed, contingent, liquidated and/or unliquidated, which Rosenbaum . . . now ha[s], ever had or may hereafter have against the Releasees by virtue of Rosenbaum's relationship with the Trust in any and all capacities whatsoever at any time."

It would certainly appear, considering the language of the release, that Rosenbaum waived all claims, present and future, as to the trust. The court below, however, held that such a general waiver could not [*be*] upheld. It first cited 29 U.S.C. § 1110, which states in pertinent part: "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." The court held that this provision prevented it from enforcing any waiver as to future claims against the Plan.

Davis argues, however, that this section does not apply to voluntary releases. It cites two cases for support. The first case, *Arnulfo P. Sulit, Inc., et al.* v. *Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988), concerned an agreement to take ERISA plan claims to arbitration. The court ruled that § 1110 did not prevent this kind of agreement. *Id.* at 478. Davis also cites an unpublished opinion of this court, *Miller et al.* v. *General Motors Corp.*, No. 87-1493, (6th Cir., April 27, 1988), in which the panel held that an agreement to waive all employee rights under an employment contract, including benefits, in exchange for the opportunity to purchase stock did not violate § 1110.

These cases are inapposite. *Sulit* only concerned an agreement as to the forum in which claims should be adjudicated, not a release of the claims themselves. *Miller* concerned the waiver of rights under an employment contract, not the waiver of claims that the administrators of a plan violated their fiduciary duty to the plan. The present case, on the other hand, involves exactly the type of case § 1110 was meant to apply to, a waiver of claims of breach of fiduciary duty. The prohibition should apply.

The district court also held that because the waiver applied to future claims, there was a failure of consideration. Davis argues that there was clear consideration for the waiver in that Davis agreed to settle the dispute over the alleged overpayment to Rosenbaum by splitting the difference between each side's demands. The general waiver was the price Davis received in exchange for compromising its demands. In addition, Davis contends that the cause of action in the present case already existed at the time of the release in so much as Rosenbaum knew that there was an overfunding of the plan of some amount. He also knew that Davis, under the provisions of the Plan, intended to keep the reversion. His knowledge of these facts led him to reserve the redeemed stock action in the release, an action that would mean nothing if there was no overfunding. It is clear, then, Davis argues, that Rosenbaum intended to give up any claim in the residual assets.

We conclude, however, that it is clear that the release only applied to the claim concerning the overpayment of funds to him, not any future claims as to residual assets. Michigan law holds that a release covers only claims intended by the parties to be released and has no greater effect. *Auto-Owners Insurance Co.* v. *Higby*, 226 N.W.2d

580, 582 (Mich. App. 1975). Rosenbaum could not possibly have waived such a claim because at the time this court had not yet decided *Bryant* v. *Int'l Fruit Products Comp., Inc.*, 793 F.2d 118 (6th Cir. 1986), in which this court held for the first time that amendments like the one giving the residual assets to Davis were void. Up until this point, Rosenbaum had no cause to believe that the residual assets would not go to Davis under the Plan.

In addition, at the time of the release, Davis had not yet even calculated the amount of the residuals, much less taken possession of them. Thus, Rosenbaum could not have any cause of action at the time because up until the point at which Davis took the assets, Davis could have fulfilled its duty and returned the assets to the participants. It was not until December 24, 1985, when Davis paid itself the balance of the assets, that the cause of action accrued. Rosenbaum cannot be deemed to have waived this action on November 1. Finally, it should be pointed out that Rosenbaum would have been very foolish to waive a claim to over $50,000 for a settlement that netted him about $2,000. We hold that the release does not bar this claim.

V

Davis next contends that the provision of the Amended Plan allowing a reversion of surplus assets to the company was valid. The district court held that, under the interpretive principles established in *Bryant*, the Original Plan prohibited such an amendment. It found such a prohibition in the provisions of the plan that stated: "No amendment shall provide for the use of trust funds for any purpose other than for the benefit of the participants and their beneficiaries" and that "No funds contributed to this trust nor assets of the trust shall ever revert to or be made available to the

Employer." Davis argues that the plan reviewed in *Bryant* is distinguishable from the one at issue here and that the Original Plan allows the amendment authorizing a reversion.

Davis bases its argument concerning the correct interpretation of the Original Plan on the structure of that plan. Davis points to the provisions of the Original Plan that define a contribution under the Plan. Davis argues that participants in the plan are entitled only to the specific amount of benefits discussed in the plan. The company is bound under the provisions of the plan to contribute enough money to provide those benefits. These contributions constitute the trust fund and are the funds which cannot revert back to the employer. Contributions in excess of those needed to generate the required benefits, however, are not part of the plan, are not made for the benefit of the participants, and should be returned to the employer. Thus, the prohibition against the reversion of contributions did not apply to the surplus assets claimed by Davis.

Davis finds support for this view in *In Re C.D. Moyer Company Trust Fund*, 441 F.Supp 1128 (E.D. Pa. 1977), where the court held that where the original plan stated it was "impossible, if any alteration, amendment or revocation be made . . . for any of the trust corpus or income to be diverted to or revert to either of the employers or to be used for any purpose other than the exclusive benefits of the participants," an amendment allowing surplus assets to revert to the employer was acceptable because such assets were not part of the trust funds to be paid to beneficiaries. *Id.* at 1131, 1132. Davis also cites *Wilson* v. *Bluefield Supply Co.*, 819 F.2d 457 (4th Cir. 1987). There the court held that a provision stating: "No part of the Fund . . . shall be withdrawn, assigned, or otherwise transferred in whole or in part" did not prohibit an

amendment allowing residual assets to be diverted to the company. *Id.* at 462, 465. The court reasoned that the "Fund" only included those monies that were to be paid as benefits, not surplus assets. *Id.* at 464. Davis contends that the plan here, as in *Moyer* and *Wilson*, prohibited only the transfer of funds that were to be paid out as benefits.

We conclude, however, as did the court below, that this case is controlled by *Bryant*. In that case, this court considered exactly the issue disputed here. The original plan in *Bryant* contained a provision reading: "In no event and under no circumstances shall any contributions to this Trust by the Employer, nor any of the Trust Estate or the income therefrom, revert to or be repaid to the Employer; and all amounts paid by the Employer to the Trustees shall be used and applied for the sole and exclusive benefit of the participants under this Trust." *Bryant*, 793 F.2d at 120. In a second amended plan, the plan was amended to allow the distribution of the surplus assets to the company.

The court found the amendment void, holding that "this pension plan assured the participating employees that, once contributed, no money paid into the fund could ever be reclaimed by the company. . . . Even if a surplus from actuarial error might properly be considered not to be a part of the trust estate, nevertheless, the surplus assets did originate as 'contributions' to the trust." *Id.* at 123. The court was also impressed by the fact that the provision stated that under no circumstances, presumably including a surplus, could money revert to the employer. The court distinguished *Moyer* by saying the provision there referred only to the trust funds used for payment, not to the total contributions. *Wilson* can be distinguished on the same basis, as indeed the *Wilson* court did, when it discussed *Bryant*.

The provisions at issue in this case are similar to those in *Bryant*. The Original Plan referred to contributions, not the trust fund, and it also stated that no such funds shall ever revert to the employer. Davis attempts to distinguish *Bryant* by stating that it is not clear that the plan there was designed as was the plan here to eliminate surplus funds. Davis also argues that the *Bryant* plan refers not only to contributions, but also to the trust income and estate, making it clearer than is the case here that no income can be diverted. These attempts to distinguish *Bryant* are unpersuasive. We conclude that, following *Bryant*, the amendment is void.

VI

Davis also contends that Rosenbaum should be estopped from maintaining this claim because he should not be able to profit from his bad acts. Davis contends that if the Amended Plan's provisions are contrary to the law, Rosenbaum should not be able to profit from these errors because, as president and majority stockholder of Davis, he was responsible for that plan. Rosenbaum, Davis points out, stated in the stock redemption agreement signed when he resigned, that "the Company is not in default in any material respect under any contract to which it is a party." Rosenbaum, Davis contends, did not keep this promise.

Michigan law holds that estoppel arises where one by his acts, representations, or silence when he ought to speak, intentionallly or through culpable negligence induces another to believe in the existence of certain facts and that person justifiably relies on the existence of the assumed facts to his detriment. *Hastings Mutual Insurance Company* v. *Hartford Accident & Indemnity Company*, 352 N.W.2d 292, 295 (Mich. App. 1984). One

must have actual or constructive knowledge of the real facts in order for estoppel to exist. *Langschwager* v. *Pinney,* 88 N.W.2d 276 (Mich. 1958).

Davis contends that Rosenbaum negligently led Davis into amending the plan to its detriment. Davis relied on Rosenbaum's representations that the plan was valid in making contributions to the plan. Had Davis known that any surplus assets were to go to the employees and not the company, it might have been able to avoid making excess contributions. Rosenbaum, as an experienced businessman, must be deemed to have constructive knowledge of the law as it relates to his business. Davis concludes that Rosenbaum should not be able to profit from his questionable acts.

It is our view, however, that Rosenbaum was in no way negligent in making the plan. The amendment was made in 1979, several years before *Bryant* held that such amendments were void. Rosenbaum never meant to injure Davis and, in fact, Davis is not injured. It merely has to give up a windfall to its rightful owners. As to its argument that reliance on the plan's validity led to excess contributions, Davis has argued in this appeal that the plan was designed to limit excess contributions. It should not now be able to argue that in fact it was lulled into overfunding. Lastly, we note that the wrongful act here was not the amendment, but the reversion of the funds. If Davis had not chosen to take the funds, there would have been no violation of the law. Rosenbaum had every right to sue.

VII

Finally, Davis contends that the lower court erred in awarding Rosenbaum fees and denying its motion for fees. The decision of the district court concerning the

grant of fees in ERISA cases should not be disturbed unless there is an abuse of discretion. *Operating Engineers Pension Trust* v. *Beck Engineering & Surveying Co.*, 746 F.2d 557, 569 (9th Cir. 1984). The criteria that a court should apply in deciding whether to award fees are laid out in *Central States Pension Fund* v. *888 Corp.*, 813 F.2d 760, 767 (6th Cir. 1987). They are: (1) the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of attorney's fees; (3) whether an award of fees against the opposing party would deter others from acting in similar circumstances; (4) whether the party requesting fees sought to benefit all participants and beneficiaries of a multiemployer plan or to resolve a significant legal question; and (5) the relative merits of the parties' positions.

The court below held that the grant of fees was warranted because, first, Davis acted in disregard of the law as set out in *Bryant*, even after Rosenbaum cited the case when requesting payment. The release, the court held, does not justify Davis's actions. Second, Davis clearly had the money to pay fees. Third, this award would deter future similar conduct. Fourth, this litigation has resolved key legal questions regarding the distribution of assets, and all the participants will be benefitted by the result. Finally, the court held that Rosenbaum's legal position is far more meritorious than Davis's.

Davis contends that the court abused its discretion by not considering, when deciding that Davis acted in bad faith, the confusing and unsettled state of the law concerning reversion issues. Davis can also not be accused of bad faith in relying on a general release of claims or in interpreting the agreement as excluding Rosenbaum as a

participant. Also, Davis argues that Rosenbaum did not seek to resolve important questions; he merely wanted to receive a windfall. In short, the issues in this case are too complex and the questions too close for fees to be awarded.

Even taking into account the abuse of discretion standard, we agree with Davis that fees should not have been awarded in this case. The issues in this case are unsettled enough that neither party can be said either to be acting with bad faith or to have an obviously more meritorious position than the other. We thus **REVERSE** and **VACATE** the award of attorney's fees. On all other issues, the judgment of the court below is **AFFIRMED**.

APPENDIX C

AMENDED MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan — Southern Division)

(Filed October 7, 1987)

(IRVING J. ROSENBAUM, Plaintiff and Counter-Defendant, vs. DAVIS IRON WORKS, INC., Defendant and Counter-Plaintiff, vs. SHELDON D. EIZEN; NATIONAL ADMINISTRATIVE SERVICES OF MICHIGAN, INC.; AUSTIN A. KANTER; AUSTIN A. KANTER, C.L.U. & ASSOCIATES, INC.; JACK L. ROSEN; and JACK L. ROSEN, P.C., Third-Party Defendants — CIVIL NO. 87-70200)

Plaintiff has filed this action to compel a pro rata distribution of residual assets of $63,868.00 to the participants in Defendant's pension plan as of its termination date of October 5, 1984. This Court has subject matter jurisdiction pursuant to 29 U.S.C. § 1132. On July 20, 1987, a hearing was held on Plaintiff's motion for summary judgment on the complaint and to dismiss Defendant's counterclaim. The Court granted Plaintiff's motion in its entirety for reasons herein described. This memorandum represents the Court's findings of fact and conclusions of law in support of the ruling announced at the hearing.

FINDINGS OF FACT

The facts of this case are not in dispute.

Defendant Davis Iron Works, Inc. is a Michigan corporation which provides fabricated steel components to

general contractors in the building industry in metropolitan Detroit. From the early 1960s until his resignation on June 8, 1984, Plaintiff Irving J. Rosenbaum was the majority shareholder and the president of Davis.

In 1967, Defendant established the Davis Iron Works, Inc. Pension Trust ("Trust") to cover its eligible non-union employees. The Trust was submitted to the Internal Revenue Service on December 28, 1968 and received a favorable determination as a "qualified pension plan" under the Revenue Act of 1954, 26 U.S.C. § 401(a).

Under the 1967 Trust, Defendant agreed to purchase annuity contracts on the eligible employees which would create a monthly pension upon the employee's retirement. The relevant provisions of the Trust are as follows:

> 7.4 All amounts contributed by the Employer to the Trustee shall represent irrevocable contributions of the Employer to this Trust.
>
> * * *
>
> 12.1 The Employer by action of its Board of Directors may amend this trust at any time, or from time to time, as evidenced by an instrument in writing executed in the name of the Employer by a duly authorized officer under the corporate seal of the Employer provided, however:
>
> * * *
>
> (b) No amendment shall provide for the use of trust funds for any purpose other than for the benefit of the participants and their beneficiaries.

(c) No funds contributed to this trust nor assets of the trust shall ever revert to or be made available to the Employer.

* * *

12.4 Upon termination of the trust any assets of the trust, other than contracts issued on the lives of participants, shall be distributed among the then participants in proportion to the attained cash values upon contracts then outstanding on the lives of such participants.

The 1967 Trust was amended and reframed in its entirety on June 1, 1979 to comply with the provisions of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* The 1979 Trust deleted the above-quoted paragraphs of the 1967 Trust and replaced them with the following provisions:

22.2 (E) In the event there are assets of the Trust Fund remaining after the allocation under Subsection 22.2(D), the remaining assets shall be returned to the Corporation.

* * *

24.1 *Exclusive Benefit.* Except as otherwise specifically provided herein, under no circumstances shall any funds contributed to this Trust or any assets of this Trust ever revert to, or be used or enjoyed by the Corporation, nor shall any such funds or assets ever be used other than for the benefit of Employees of the Corporation hereunder or their Beneficiaries, and for defraying reasonable expenses of administering the Plan and Trust.

In addition, paragraph 3.2 designated Davis as the Trust's Administrator. Plaintiff continued as the Trustee.

On June 8, 1984, Plaintiff resigned as president and director of Davis and as trustee of the Trust. A Stock Redemption Agreement was executed whereby Defendant purchased all of Plaintiff's shares in the company. On the date of the redemption, the parties also executed a mutual release concerning the stock transaction.

Plaintiff's accrued and vested benefits in the Trust were calculated upon his retirement from Defendant. Pursuant to the terms of the Trust, Plaintiff elected to have the actuarial equivalent of his accrued benefits transferred to a separate account within the Trust to be held by the Trust until he decided to withdraw them. Said benefits were to be invested and to earn interest attributable to Plaintiff's account.

On October 5, 1984, Defendant terminated the Trust. On March 24, 1985, before the benefits were paid to the participants, Defendant notified Plaintiff that due to errors made by the actuaries, the Trust had miscalculated his benefit and that $65,324.00 being held in his segregated account would have to be returned to the general Trust. A dispute arose between the parties as to the computation of the correct amount to be returned. On November 1, 1985 Plaintiff, Defendant and the Trust entered into an Agreement to allocate the assets and interest that would constitute Plaintiff's accrued benefits from the Trust. The Trust paid Plaintiff his pension benefits.

After payment of all benefits and the expenses of terminating the Trust, an overfunding resulted in residual assets of $63,868.00. Plaintiff was promptly advised of this fact and demanded 75% (the percentage of his stock which was redeemed) of those residual assets. However, pursuant to paragraph 22.2(E) of the 1979

Trust, the excess assets were returned to Defendant. It is this surplus of assets that is in issue in the present litigation.

CONCLUSIONS OF LAW

PLAINTIFF'S COMPLAINT

On January 22, 1987 Plaintiff filed this lawsuit against Defendant Davis Iron Works, Inc. to compel a pro rata distribution of residual assets of $63,868.00 to the participants in Defendant's pension plan as of its termination date of October 5, 1984. The complaint alleges that Defendant failed to exercise reasonable care in determining the amount of surplus and in drafting an amendment to the Trust that would eliminate the surplus by increasing the benefits of the participants. In addition to distribution of the residual assets, Plaintiff requests costs, interest and attorneys fees.

In its answer to the complaint, Defendant argues that Plaintiff lacks standing to maintain this action under 29 U.S.C. § 1132 because he was not a participant of the Davis Iron Works, Inc. Pension Trust when the lawsuit was filed. Defendant further argues that the transfer of Plaintiff's accrued benefits to a separate account was equivalent to a constructive lump-sum distribution within the intent and policy considerations of ERISA's definition of "participant." The Court finds both of these arguments to be without merit and unsupported by the evidence.

The terms of ERISA are enforceable through a civil action brought by the Secretary of Labor or a participant, beneficiary or fiduciary of a pension plan. 29 U.S.C. § 1132(a). The term "participant" is defined as:

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7).

There is no question that Plaintiff was a "participant" in Defendant's pension plan within the meaning of 29 U.S.C. §§ 1132(a) and 1002(7). On October 5, 1984, the date the Trust was terminated, Plaintiff was a "former employee . . . eligible to receive a benefit." He continued to be a participant until November 1, 1985, when he and the other four participants received their accrued benefits from the Trust.

Defendant's argument that Plaintiff's "participant" status ceased upon transfer of his benefits to a separate account is defeated by the following corporate documents *prepared by or on behalf of the Defendant:* a Summary Annual Report for the Trust which specifically states that five persons, including Plaintiff, were participants in the Trust at the end of the plan year, December 24, 1985; and the 1984 Form 5500-C and attached Schedule SSA filed on January 31, 1986 with the Internal Revenue Service, the Department of Labor and the Pension Benefit Guaranty Corporation to terminate the Trust, which designated Plaintiff as a participant for the plan year ending September 20 [*sic*, 30], 1985. Therefore, Plaintiff does have standing to maintain the present action to recover his pro rata share of the residual assets to which he was entitled as a plan participant.

Defendant argues that Plaintiff is barred from maintaining this action to recover the residual assets because he clearly and unambiguously released all of his claims against the Trust and the Defendant company pursuant to a Mutual General Release dated June 8, 1984 and/or a subsequent Agreement dated November 1, 1985. The Court finds that Defendant's argument must fail as a matter of federal and state law.

Subject to limited exceptions not applicable here, ERISA provides that:

> any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

29 U.S.C. § 1110(a). Plaintiff correctly states the general purpose of this section: to prevent plan fiduciaries from coercing a settlement agreement from an employee and then using the release to prevent judicial review of the agreement. Thus, if this Court were to accept Defendant's characterization of the foregoing documents as releasing Defendant and the Trust from liability, then these releases must be declared void as against public policy under federal law.

Even in the absence of federal law, neither document would bar Plaintiff's cause of action under state law. A release covers only the claims intended by the parties to be released. *Harris* v. *Lopeer* [*sic*, Lapeer] *Public School System*, 114 Mich. App. 107 (1982).

The Mutual General Release was executed on June 8, 1984 between Plaintiff and Defendant in conjunction with the Stock Redemption Agreement of the same date. The Trust, by its trustee or administrator, was not even a

party to the release. This document only released the Defendant with respect to claims arising out of Plaintiff's majority ownership of stock in, and his employment by, the Defendant company. Quite clearly, any claims arising out of the Trust were neither contemplated nor covered by the release given, since the reversion to Defendant of the residual assets did not occur until December of 1985.

The Agreement dated November 1, 1985 was executed by the parties, including the Trust, to resolve a dispute regarding the allocation of assets and interest that would constitute Plaintiff's accrued benefits from the Trust. Paragraph 14 of the Agreement released Defendant, the Trust and its fiduciaries from any and all liability claims Plaintiff has or "may hereafter have" against the Trust.

To the extent that Plaintiff agreed to release Defendant from all *future* claims in exchange for his vested accrued benefits, the release would be without consideration. A promise to perform a legal contractual obligation does not constitute sufficient consideration for a contractual promise (*i.e.*, release) from the other party. *Ruffin* v. *Mercury Record Publications, Inc.*, 573 [*sic*, 513] F.2d 222 (6th Cir. 1975), *cert. denied*, 423 U.S. 914 (1976). Moreover, a release is limited only to claims that could have been in existence at the time of the execution under current state law. *Auto-Owners Insur. Co.* v. *Higby*, 57 Mich. App. 604 (1975). On November 1, 1985, when the release was executed, Plaintiff's cause of action as to the reversion had not yet accrued; that did not occur until December 24, 1985.

Clearly, the release contained in the Agreement of November 1, 1985 does not bar Plaintiff's present action to recover his pro rata share of the residual assets. To the contrary, the Agreement created an explicit exception to

the release: Plaintiff maintained his claim to an increase in the purchase price of his stock redeemed by Defendant "by reason of the reversion of Trust funds to [Defendant] upon termination and liquidation of the Trust." Therefore, neither of the two releases relied upon by Defendant operates as a bar to the instant proceedings.

Defendant argues that the 1979 amended Trust properly permitted a reversion of the residual assets of the pension plan to the Defendant upon termination of the Trust. Plaintiff counter-argues that under the law in this jurisdiction, the Trust amendment providing for the reversion is null and void, and therefore, Defendant is required to return the residual assets to the Trust for distribution to the plan participants.

Under ERISA, any residual assets of a single-employer plan may be distributed to the employer if the plan so provides. 29 U.S.C. § 1344(d)(1). To determine whether the Davis Iron Works, Inc. Pension Trust provides for such a distribution in the case at bar, the Court must review the relevant provisions of the original 1967 Trust. Amendments to the Trust were permitted subject to the following exceptions. Paragraph 12.1(b) forbade any amendment that provided for the use of trust funds for any purpose other than for the participants. Paragraph 12.1(c) unequivocally stated that no funds contributed to the trust or assets of the trust shall ever revert to the employer. And paragraph 12.4 required that on termination of the plan, excess assets were to be distributed pro rata among the participants.

The 1979 amended Trust deleted the foregoing paragraphs and inserted paragraph 22.2(E), which provided that upon termination of the Trust, all residual assets would revert to the Defendant company.

The issue presently before the Court is whether an employer may properly amend an employee benefit plan to provide for a reversion of residual assets to that employer upon termination of the plan. This issue was recently addressed by the Sixth Circuit Court of Appeals in *Bryant* v. *International Fruit Products Company, Inc.*, 793 F.2d 118 (6th Cir. 1986), a case factually similar to the one at bar. In *Bryant*, the defendant-employer created a benefit plan in 1959 which qualified under 26 U.S.C. § 401(a)(2). Sections 5.3 and 13.1, respectively, of the 1959 Plan contained an absolute prohibition that no contributions, assets or income from the plan could ever revert to the employer and no amendment could be enacted to cause such a reversion. To conform with the requirements of ERISA, the employer amended and restated the plan in 1976, and omitted the anti-reversion sections of the 1959 Plan. In 1982, the plan was amended again to add a new provision to section 11.2 which provided that any excess assets remaining as a result of actuarial error would revert to the employer. Upon termination of the plan, $139,000.00 was returned to the employer.

The *Bryant* plaintiffs, who were participants in the plan at the time of its termination, brought suit to compel distribution of the excess assets to themselves. The United States District Court for the Southern District of Ohio entered judgment for the employer. The Sixth Circuit Court of Appeals reversed and remanded the case to the district court to equitably distribute the excess funds to the plan participants. In reaching its decision, the appeals court principally relied upon Section 5.3 of the 1959 Plan that prohibited any reversion to the employer:

> In no event and under no circumstances shall any *contributions* to this Trust by the Employer, nor

> any of the Trust Estate or the income therefrom revert to or be repaid to the Employer.

Bryant, 793 F.2d at 122 (emphasis added). The court concluded that "[e]ven if a surplus from actuarial error might properly be considered not to be part of the trust estate, nevertheless, the surplus assets did originate as 'contributions' to the trust." *Id.* at 123. Accordingly, the reversion amendment was voided by the court.

In determining the validity of the trust amendment in this case, the Court is bound by the Sixth Circuit precedent established in *Bryant*. Paragraph 12.1(c) of the 1967 Davis Trust states:

> No funds *contributed* to this trust nor assets of this trust shall ever revert to or be made available to the Employer.

(Emphasis added.) This language is absolute and precludes the post-ERISA amendment to the Trust adopted in 1979 to provide for a reversion of assets to Defendant. Therefore, said amendment is null and void.

Defendant attempts to distinguish paragraph 12.1(c) of the Davis Trust from *Bryant* by noting the absence of the words "no amendment" or "in no event and under no circumstances" from the beginning of that subparagraph. This distinction is disingenuous for several reasons. First, Defendant fails to acknowledge that paragraph 12.1 is part of Article XII entitled "Amendment and Termination." The four subparagraphs, including 12.1(c), list the amendments which are *not* permitted. Second, paragraph 5.3 of the *Bryant* plan did not even use the word "amendment." Instead, that court relied upon the word "contribution" coupled with the absolute prohibition against a reversion to the employer to void that amendment. The language of paragraph 12.1(c) of the 1967 Trust falls squarely within *Bryant*.

Defendant's reliance on *Wilson* v. *Bluefield Supply Co.*, 819 F.2d 457 (4th Cir. 1987) is misplaced. The *Wilson* case is factually distinguishable from the instant case. There, the defendant-employer created a defined benefit plan in 1951 for eligible employees. The 1951 Plan provided that pension fund assets were for the exclusive benefit of the employees and could not be withdrawn "either by the voluntary act of the Company . . . or otherwise." In 1973, the Plan was amended to expressly provide that any residual assets would be distributed to the employer upon termination of the Plan. The Plan was terminated in 1985 and $14.5 million of residual assets were distributed to the employer.

The *Wilson* plaintiffs, who were employees, surviving spouses or estates with vested pension rights, filed a class action seeking distribution of the residual assets to themselves. The United States District Court for the Southern District of West Virginia entered summary judgment for the employer and other named defendants on the grounds that the 1951 Plan did not bar the residual assets amendment.

On appeal, the Fourth Circuit Court of Appeals affirmed the district court. The critical difference noted by the appeals court that distinguished *Wilson* from *Bryant* was as follows: While the nondiversion provision of the 1951 Plan in *Wilson* arguably barred amendments resulting in a withdrawal or transfer from the "Fund" (*i.e.*, "by the voluntary act of the Company . . . or otherwise"), the nonreversion provision in *Bryant* went much farther by providing that "[i]n no event and under no circumstances shall any *contribution* . . . be *repaid* to the Employer" (emphasis added).

The Davis Trust presently in issue specifically refers to the return of "contributions" to the employer; it does

not generally prohibit withdrawals from the "Fund". Accordingly, *Bryant* is the controlling case.

Even if *Wilson* were factually similar to the case at bar, which it is not, this Court is bound to follow the Sixth Circuit precedent established in *Bryant* and not the Fourth Circuit's opinion in *Wilson*.

Defendant argues that Plaintiff is estopped from maintaining this action because Plaintiff was the president of and a majority shareholder in Davis Iron Works, Inc. at the time the 1979 amended Trust was adopted and should not receive any benefits as a result of the nullification of the amendment regarding reversion of assets.

The doctrine of estoppel is essentially based upon misrepresentation. Specifically, estoppel arises when one by his acts, representations or silence, intentionally or through culpable negligence, induces another person to believe in the existence of certain facts and that person justifiably relies on those facts to his detriment. *Bently* v. *Cam*, 362 Mich. 78 (1960); *Hastings Mutual Ins. Co.* v. *Hartford Accident & Indemnity Co.*, 134 Mich. App. 662 (1984). Defendant has failed to establish the requisite elements of estoppel.

Contrary to Defendant's assertion, the "wrongful act" which forms the basis of Plaintiff's cause of action is *not* the 1979 amendment to the Trust. Rather, it is the distribution of residual assets to the defendant-employer. Plaintiff was no longer affiliated with Defendant at the time Defendant made the decision to claim the reversion.

The Trust was amended in 1979 to conform with the requirements of ERISA. Defendant has never claimed that Plaintiff intended to mislead or even injure the Defendant by passage of the 1979 amendment which,

incidentally, was drafted on behalf of and in the best interests of the Defendant. At the time of its adoption, all parties involved believed the amendment was valid. Said amendment did not become null and void until the Sixth Circuit's decision in *Bryant* was issued in 1986. Furthermore, Defendant did nothing in reliance on the amendment. The Trust was terminated *prior to* Defendant's discovery that a surplus even existed. This Court's nullification of that amendment results in no damage, loss or prejudice to the Defendant but merely denies Defendant a windfall of assets that it once contributed to the Trust, and was not entitled to reclaim. Therefore, the residual assets must be returned to the Trust for distribution to the plan participants. *Bryant, supra.*

Having granted Plaintiff's motion for summary judgment on the complaint and having determined that the 1979 amendment to the Trust is null and void, Plaintiff is entitled to a proportionate allocation of the surplus assets.

The formula for allocating residual assets in a pension plan which does not provide for a reversion to the employer is set forth in the Internal Revenue Service Regulations at 29 C.F.R. § 2618.32(a). The total value of residual assets ($63,868.00) is to be multiplied by the participant's present value of his accrued benefits divided by the present value of *all* accrued benefits of the participants ($289,767.43/$422,222.00). Application of the formula to the facts of this case reveals that Plaintiff is entitled to $43,832.07 of the reversion. There is no dispute as to the numbers to be inserted into the formula. Furthermore, this formula is consistent with paragraph 12.4 of the 1967 Trust that requires all surplus assets to be distributed to the participants in proportion to their benefits.

Defendant argues that Plaintiff is not entitled to share in the reversion, even if successful, because he was not an "active" participant when the Trust was terminated. This argument must fail for several reasons. First, Defendant cites no authority whatsoever to support its proposition. Second, Plaintiff is within the "pool of eligible participants", as defined by I.F S. Regulations, entitled to benefits as of the date the plan assets were to be distributed. *See* 29 C.F.R. § 2618.2.

In addition to his $43,832.07 share of the residual assets, Plaintiff is entitled to prejudgment interest on that amount from the date of December 25, 1985, the date that Defendant refused to allocate the assets among the participants. *Short* v. *Central States, Southeast & Southwest Areas Pension Fund*, 729 F.2d 567 (8th Cir. 1984). The interest rate is to be determined under 28 U.S.C. § 1961(a).

Pursuant to 29 U.S.C. § 1132(g), the Court also will grant Plaintiff's reasonable request for attorneys fees and deny Defendant's counter-request for the same.

Defendant correctly notes that the appropriate guidelines under which a district court may exercise its discretion and award attorneys fees under ERISA were articulated in *Central States Pension Fund* v. *888 Corporation*, 813 F.2d 760, 767 (6th Cir. 1987):

(1) The degree of the opposing party's culpable or bad faith; —

(2) The ability of the opposing party to satisfy an award of attorneys fees;

(3) Whether the party requesting fees against the opposing party would deter others from acting in similar circumstances;

(4) Whether the party requesting fees sought to benefit all participants and beneficiaries of a multi employer plan or to resolve a significant legal question; and

(5) The relative merits of the parties' positions. *See also Thomas* v. *Marshall*, 482 F. Supp. 160 (S.D. Ala. 1979).

Application of these guidelines to the facts of this case reveals that Plaintiff, and not Defendant, is entitled to recover attorneys fees under the circumstances of this case. First, prior to instituting this litigation, Plaintiff requested that Defendant return the residual assets to the Fund in light of the *Bryant* decision. Defendant's refusal to do so was totally unjustified in the law. Plaintiff's execution of releases with respect to the stock agreement does not bar Plaintiff's action or overshadow Defendant's intransigence. Second, Defendant fails to argue it would be unable to pay any amount requested by Plaintiff. Third, such an award would deter other employers from similar conduct, and is fully justified by the quantity and quality of legal work required to be performed. Fourth, the amount of benefits to be transferred back to the Trust is significant: $63,868.00. Entering summary judgment for Plaintiff will benefit him *and* the four remaining participants entitled to receive those residual assets. This litigation has resolved a significant legal question regarding the proper amendment of pension plans to provide for a reversion of assets to the employer upon termination of the plan. Finally, Plaintiff's legal position in these proceedings was by far more meritorious than that of Defendant. Therefore, an award of attorneys fees for Plaintiff will be entered accordingly upon submission of an affidavit to the Court substantiating the hours expended with respect to this litigation.

DEFENDANT'S COUNTERCLAIM

On February 13, 1987, Defendant filed a three-count counterclaim against Plaintiff. Counts I and II seek damages for breach of fiduciary duty under ERISA. Count III is a state law claim for contractual indemnity. Plaintiff requests dismissal of the foregoing causes of action.

The Court must dismiss Counts I and II of Defendant's counterclaim based on breach of fiduciary duty. A cause of action for breach of fiduciary duty is governed by 29 U.S.C. § 1109:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan *any losses* to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of the fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.
>
> (b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

(Emphasis added.) Persons entitled to sue for breach of fiduciary duty are limited to the Secretary of Labor, or a participant, beneficiary or fiduciary of the pension plan. 29 U.S.C. § 1132(a)(2).

Defendant's designation as "Administrator" of the Trust does not qualify Defendant as a "fiduciary" unless Defendant is suing in its administrative capacity on behalf of Plaintiff or other plan participants. Here, the counterclaim is brought by Defendant in its capacity as an "employer" and for *its* sole benefit. An employer is not entitled to maintain a civil action under ERISA against a fiduciary for breach of fiduciary duty. "Permitting recovery by employers for damages allegedly caused by trust mismanagement would deplete the Funds' assets and thus hinder the achievement of a primary goal of ERISA, protection of the interests of participants in employee benefit plans and their beneficiaries." *Central States, Southeast and Southwest Areas Pension Fund* v. *Admiral Merchants Motor Freight, Inc.*, 511 F. Supp. 38, 47 (D. Minn. 1980), *aff'd*, 642 F.2d 1122 (8th Cir. 1981).

In addition, Defendant has failed to allege, as required by 29 U.S.C. § 1109, that the Trust suffered a loss or that Plaintiff made a profit through the use of plan assets as a result of the reversion amendment adopted in 1979. Therefore, the Court finds that Defendant lacks standing under ERISA to counterclaim against Plaintiff for breach of fiduciary duty. Counts I and II are hereby dismissed.

Even if Defendant had standing to maintain its cause of action for breach of fiduciary duty, said action would be barred by the applicable statute of limitations, which provides:

> No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, *after the earlier of* —

> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113 (emphasis added).

In the instant case, the date of the last action by Defendant which allegedly constituted the breach (*i.e.*, enactment of the amended Trust) was June 1, 1979. Six years from that date was June 1, 1985. Alternatively, the date Defendant had actual knowledge of the breach was when Defendant was informed of the *Bryant* decision: December of 1986. Three years from that date is December of 1989. Defendant is statutorily required to file suit by the earlier of these two dates — July 1, 1985. Since its counterclaim was not filed until February 13, 1987, Count I and II would be barred by the statute of limitations.

Defendant's argument that its counterclaim is not barred because the statute of limitations did not begin to run until June 8, 1984, the last date on which Plaintiff as the Trust's fiduciary could have cured the reversion

amendment, is totally without merit. Contrary to Defendant's assertion, Plaintiff's failure to amend the Trust prior to his resignation as a trustee and termination of his employment with Defendant on June 8, 1984 does not constitute an "omission" within the meaning of 29 U.S.C. § 1113(1)(B). As the Court has previously noted, the amendment was valid until the *Bryant* decision was rendered by the Sixth Circuit in 1986. Thus, in 1984, there was no error for which Plaintiff was obligated to "correct."

Similarly, the Court must dismiss Count III of the counterclaim for contractual indemnification under the Stock Redemption Agreement for assets Defendant is required to return to the Trust.

The Stock Redemption Agreement, dated June 8, 1984, provides:

> 4.1 Rosenbaum shall indemnify the Company for 75% of the cost to the Company following reduction of income tax, if any, of any liability that the Company incurs as a result of a breach of any of the representations or warranties made by him in Article III.
>
> 4.2 Notwithstanding paragraph 4.1, Rosenbaum shall indemnify the Company for 75% of the cost to the Company following reduction of income tax, if any, of any liability that accrues prior to December 31, 1983 and for which there is insurance coverage, to the extent that the Company's liability exceeds the applicable insurance coverage.

Paragraph 4.1 is inapplicable because none of the warranties and representations made in Article III relates to the Trust. The "liability" Defendant seeks indemnifica-

tion on did not even become contingent until this lawsuit was filed on January 22, 1987. Paragraph 4.2 also is not applicable because Defendant's "liability" to the Trust for the amount of residual assets is not a liability for which there is insurance coverage and did not accrue before December 31, 1983. Since Plaintiff made no warranties regarding the Trust and Defendant had no liability to Plaintiff until it took the reversion in December of 1985, Defendant is not entitled to indemnification under the Stock Redemption Agreement. Accordingly, Count III is dismissed.

For all the reasons stated in Plaintiff's briefs and on the record at the hearing of July 20, 1987;

IT IS ORDERED that Plaintiff's motion for summary judgment on the complaint and to dismiss Defendant's counterclaim be and hereby is GRANTED.

IT IS SO ORDERED.

/s/ ANNA DIGGS TAYLOR
United States District Judge

Dated: October 7, 1987

APPENDIX D

JUDGMENT

(United States District Court —
Eastern District of Michigan — Southern Division)

(IRVING J. ROSENBAUM, Plaintiff(s), -vs- DAVIS IRON WORKS, INC., Defendant(s) — Civil Action No. 87-70200)

This court having entered its Memorandum Opinion and Order in the above-captioned cause, judgment is hereby entered for Plaintiff.

/s/ ANNA DIGGS TAYLOR
United States District Judge

Dated: September 21, 1987

APPENDIX E

RULE 54(b) CERTIFICATE

(United States District Court —
Eastern District of Michigan — Southern Division)

(IRVING J. ROSENBAUM, Plaintiff and Counter-Defendant, v DAVIS IRON WORKS, INC., Defendant, Counter-Plaintiff and Third-Party Plaintiff, v SHELDON D. EIZEN, NATIONAL ADMINISTRATIVE SERVICES OF MICHIGAN, INC., a Michigan corporation, AUSTIN A. KANTER, AUSTIN A. KANTER, C.L.U. AND ASSOCIATES, INC., a Michigan corporation, JACK L. ROSEN and JACK L. ROSEN, P.C., a Michigan professional corporation, jointly and severally, Third-Party Defendants — Case No. 87-CV-70200-DT)

With respect to the issues determined on the cross-motions for summary judgment filed, briefed and argued by plaintiff Irving J. Rosenbaum ("Rosenbaum") and defendant Davis Iron Works, Inc. ("Davis") pursuant to a Memorandum Opinion and Order and Judgment dated September 21, 1987, which Memorandum Opinion and Order was amended on October 7, 1987 to merely correct an erroneous statutory citation, and the Court's Order of December 7, 1987 determining the amount of attorneys' fees awarded pursuant to the preceding Judgment and Memorandum Opinions and Orders, as to all of which this certificate is appended,

IT IS CERTIFIED, in accordance with Rule 54(b) F.R.Civ.P.:

(1) That the Court hereby enters final judgment on all matters contained in the Judgment of September 21, 1987, the court's Memo-

randum Opinion and Order of September 21, 1987 as corrected in its Amended Memorandum Opinion and Order of October 7, 1987, and its December 7, 1987 Order determining the amount of attorneys' fees awarded pursuant to the preceding judgment and orders;

(2) That the Court determines that there is no just reason for delay in entering final judgment thereon since (a) the pending third-party claims of Davis against the third-party defendants herein will have no effect on the rights and obligations of Rosenbaum and Davis inter se by reason of the aforesaid judgment and orders, (b) pending Count II of Rosenbaum's Complaint has become moot by reason of the Court's summary judgment on Count I of Rosenbaum's Complaint, and (c) Count II is legally distinct from Count I; and

(3) That the Order Staying Execution Pending Appeal and Setting Supersedeas Bond entered September 23, 1987 and Davis's cash bond previously deposited with the clerk of this court pursuant thereto be continued in full force and effect.

/s/ ANNA DIGGS TAYLOR
United States District Judge

APPROVED:

/s/ BARRY M. ROSENBAUM, Attorney for Plaintiff Irving J. Rosenbaum;

/s/ COLEMAN E. KLEIN, Attorney for Defendant Davis Iron Works, Inc.

DATED: February 25, 1988

APPENDIX F

RELEVANT STATUTORY PROVISIONS

---

26 U.S.C. § 401(a)(14)

(14) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that, unless the participant otherwise elects, the payment of benefits under the plan to the participant will begin not later than the 60th day after the latest of the close of the plan year in which —

(A) the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan,

(B) occurs the 10th anniversary of the year in which the participant commenced participation in the plan, or

(C) the participant terminates his service with the employer.

In the case of a plan which provides for the payment of an early retirement benefit, a trust forming a part of such plan shall not constitute a qualified trust under this section unless a participant who satisfied the service requirements for such early retirement benefit, but separated from the service (with any nonforfeitable right to an accrued benefit) before satisfying the age requirement for such early retirement benefit, is entitled upon satisfaction of such age requirement to receive a benefit not less than the benefit to which he would be entitled at the normal retirement age, actuarially reduced under regulations prescribed by the Secretary.

26 U.S.C. § 402(a)(1)

(a) TAXABILITY OF BENEFICIARY OF EXEMPT TRUST. —

(1) GENERAL RULE. — Except as provided in Paragraph (4), the amount actually distributed to any distributee by any employees' trust described in section 401(a) which is exempt from tax under section 501(a) shall be taxable to him, in the year in which so distributed, under section 72 (relating to annuities). The amount actually distributed to any distributee shall not include net unrealized appreciation in securities of the employer corporation attributable ~~to~~ the amount contributed by the employee (other than deductible employee contributions within the meaning of section 72(o)(5)). Such net unrealized appreciation and the resulting adjustments to basis of such securities shall be determined in accordance with regulations prescribed by the Secretary.

29 U.S.C. § 1002(7) Definitions

(7) The term "participant" means any employee or former employee of an employer or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1109 Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

---

29 U.S.C. § 1110 Exculpatory provisions; insurance

(a) Except as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

(b) Nothing in this subpart shall preclude —

(1) a plan from purchasing insurance for its fiduciaries or for itself to cover liability or

losses occurring by reason of the act or omission of a fiduciary, if such insurance permits recourse by the insurer against the fiduciary in the case of a breach of fiduciary obligation by such fiduciary;

(2) a fiduciary from purchasing insurance to cover liability under this part from and for his own account; or

(3) an employer or an employee organization from purchasing insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee benefit plan.

---

29 U.S.C. § 1132(a) Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

---

29 U.S.C. § 1344(d)(1)

(d) Distribution of residual assets; remaining assets

(1) Any residual assets of a single-employer plan may be distributed to the employer if —

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

Estate Tax Reg. § 20.2039-2(b), Example (4)

Example (4). Pursuant to a profit-sharing plan, the employer made contributions to a trust which were allocated to the employee's individual account. Under the plan, the employee would, upon his retirement at age 60, be given the option to have the amount credited to his account (a) paid to him in a lump sum, (b) used to purchase a joint and survivor annuity for him and his designated beneficiary, or (c) left with the trustee under an arrangement whereby interest would be paid to him for his lifetime with the principal to be paid, at his death, to his designated beneficiary. The plan further provided that, if the third method of settlement were selected, the employee would retain the right to have the principal paid to himself in a lump sum up to the time of his death. At the time of the employee's retirement, the profit-sharing plan met the requirements of section 401(a). Assume that the employee, upon reaching his retirement age, elected to have the amount credited to his account left with the trustee under the interest arrangement. Assume, further, that the employee did not exercise his right to have such amount paid to him before his death. Under such circumstances, the employee is considered as having constructively received the amount credited to his account upon his retirement. Thus, such amount is not considered as receivable by the designated beneficiary under the profit-sharing plan and the exclusion of section 2039(c) is not applicable.

Supreme Court, U.S.
FILED
AUG 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-92

In The

Supreme Court of the United States

October Term, 1989

DAVIS IRON WORKS, INC.,
Petitioner,

vs.

IRVING J. ROSENBAUM,
Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

GOLDSTEIN, SERLIN, REIZEN, ROSENBAUM & BAKER, P.C.
By: BARRY M. ROSENBAUM (P26487)
JOEL H. SERLIN (P20224)
29566 Northwestern Highway, Suite 300
Southfield, Michigan 48034
(313) 358-1960

Attorney for Respondent,
IRVING J. ROSENBAUM

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

DOES A GENERAL RELEASE OF CLAIMS FOR BREACH OF FIDUCIARY DUTY EXECUTED BY A PENSION PLAN PARTICIPANT IN SETTLEMENT OF A PLAN-RELATED DISPUTE BAR FUTURE CLAIMS OF BREACH OF FIDUCIARY DUTY UNRELATED TO THE SETTLED DISPUTE?

II.

RESPONDENT CONTENDS THAT THIS QUESTION IS A SUBSIDIARY OF QUESTION I AND SHOULD ONLY BE CONSIDERED IN CONNECTION WITH QUESTION I PURSUANT TO SUPREME COURT RULE 21.1(a).

III.

RESPONDENT CONTENDS THAT THIS QUESTION IS A SUBSIDIARY OF QUESTION I AND SHOULD ONLY BE CONSIDERED IN CONNECTION WITH QUESTION I PURSUANT TO SUPREME COURT RULE 21.1(a).

IV.

IS A RETIRED PARTICIPANT OF A DEFINED BENEFIT PENSION PLAN, WHOSE VESTED BENEFIT HAS NOT BEEN DISTRIBUTED TO HIM, ENTITLED TO SHARE IN SURPLUS PLAN ASSETS UPON SUBSEQUENT PLAN TERMINATION?

V.

DOES *BRYANT* v. *INTERNATIONAL FRUIT PRODUCTS COMPANY, INC.*, 793 F.2d 118 (6th Cir. 1986), *CERT DENIED* 479 U.S. 986, 107 S.Ct. 576, RETROACTIVELY APPLY TO REVERSIONS OCCURRING PRIOR TO THAT DECISION?

VI.

RESPONDENT ACCEPTS THIS QUESTION AS STATED BY PETITIONER.

VII.

RESPONDENT ACCEPTS THIS QUESTION AS STATED BY PETITIONER.

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No. 89-92

In The

Supreme Court of the United States

October Term, 1989

DAVIS IRON WORKS, INC.,

vs. *Petitioner,*

IRVING J. ROSENBAUM,

Respondent.

BRIEF IN OPPOSITION

TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, IRVING J. ROSENBAUM respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in its case.

STATUTES AND REGULATIONS INVOLVED

In addition to the statutes and regulations which are set out in Appendix F of the Petition for a Writ of Certiorari, the following regulations are also involved in this case and are set out verbatim in Appendix A of this brief:

29 C.F.R. 2618.2

29 C.F.R. 2618.30

29 C.F.R. 2618.32(a)

COUNTER-STATEMENT OF THE CASE

All of the Plan's assets on termination, including the reversion, originated as contributions to the Plan made by Respondent IRVING J. ROSENBAUM ("ROSENBAUM") while he was president of Petitioner DAVIS IRON WORKS,

INC. ("DAVIS"). Instead of paying himself a higher salary or bonus, ROSENBAUM routinely contributed thousands of dollars annually to the Plan. It is significant that after ROSENBAUM retired in 1984, DAVIS did not contribute any money to the Plan prior to its termination.

As DAVIS points out at page 5 of its Petition, the segregation of ROSENBAUM's accrued benefit within the Plan was designed to defer personal federal income taxes on his benefit. However, the amendment was completely permissible under the Internal Revenue Code, and was not rejected by the Service as disqualifying the Plan. Nor did the amendment provide for an *indefinite* deferral of taxation on the benefits. In fact, ROSENBAUM did pay taxes in 1985 when his benefit was actually distributed to him by the Plan.

DAVIS' characterization of the dispute which led to the execution of the November 1, 1985 Agreement is inaccurate. ROSENBAUM's accrued benefit was a specific calculation based on the number of years of his service to DAVIS and his compensation level (R. 25: Exhibit B, Article X). When DAVIS discovered that ROSENBAUM's benefit had been calculated incorrectly, ROSENBAUM agreed that any overpayment placed in his segregated account would have to be returned to the main body of the pension plan. The parties disagreed as to how to allocate certain assets and interest. Quite simply, the parties resolved this dispute by an old-fashioned compromise: they split the difference! Thus, the sum of $2,381.11 (one-half of the disputed amount) was added to the undisputed portion of ROSENBAUM's accrued benefit and he received his total accrued benefit from the Plan on November 1, 1985. This was the entire dispute between the parties and it was fully and completely outlined, paragraph by paragraph, in the November 1, 1985 Agreement (R. 25: Exhibit E, ¶¶ 8-12, pp. 2-3).

SUMMARY OF ARGUMENT

1. 29 U.S.C. § 1110(a) voids the release in the case at bar to the extent that the participant purports to release the fiduciary of the pension plan from liability for a future breach of duty to the Plan.

2. The interpretation of a release and the adequacy of consideration for same are issues of state law not involving a federal question and are not sufficient reasons for granting review on a writ of certiorari.

3. If 29 U.S.C. § 1110(a) voids the release in issue, this Court need not reach the state contractual law issues.

4. Even where the language of the release is clear and unambiguous, the courts below were authorized to go beyond the broad language of the release in determining that the participant did not intend to release his claim to a share of the reversion.

5. Respondent was a participant within the meaning of 29 U.S.C. § 1002(7) and had standing to maintain his lawsuit under 29 U.S.C. § 1132(a) for a share of the reversion because on the date that the Plan was terminated, he had not yet received his vested accrued benefits from the Plan.

6. A former employee who has already received his actuarially vested benefits may maintain an action under 29 U.S.C. § 1132(a) to recover additional benefits under the Plan as opposed to monetary damages for breach of a fiduciary duty.

7. *Bryant* v. *International Fruit Products Company, Inc.*, 793 F.2d 118 (6th Cir. 1986), *cert denied* 479 U.S. 986, 107 S.Ct. 576, does not break with past law, and should be retroactively applied to the reversion in the case at bar.

8. The language of Petitioner's original pension plan which prohibits an amendment to the Plan that permits a reversion of the surplus assets to the employer upon termination of the Plan, falls within the *Bryant* case which held that such an amendment is null and void.

9. Petitioner's interpretation of the Plan provisions regarding amendments and reversions is contrary to ERISA, and is an abuse of discretion even under an arbitrary and capricious standard of review due to Petitioner's conflict of interest.

10. When a plan provision for a reversion of surplus assets to the employer is nullified, the allocation of surplus assets to the eligible participants is controlled by 29 C.F.R. § 2618.32(a), and not by the provisions of the pre-ERISA plan that has since been amended.

REASONS FOR DENYING THE WRIT

I.

A GENERAL RELEASE OF CLAIMS FOR BREACH OF FIDUCIARY DUTY EXECUTED BY A PENSION PLAN PARTICIPANT IN SETTLEMENT OF A PLAN-RELATED DISPUTE DOES NOT BAR FUTURE CLAIMS OF BREACH OF FIDUCIARY DUTY UNRELATED TO THE SETTLED DISPUTE.

DAVIS argues that the release in issue (R. 25: Exhibit E, ¶ 14) should be enforced to bar ROSENBAUM's cause of action to recover a portion of the surplus assets that reverted to DAVIS on the termination of the Plan. DAVIS relies on several cases involving general releases which purport to enforce said releases executed as part of a good faith settlement of a dispute.

The issue presented for review by DAVIS is misleading because a bona fide dispute may be resolved by a good faith settlement which contains a release applicable to present and past claims. However, the real issue is whether under ERISA, a participant in a plan can ever release a fiduciary from liability for a *future* breach of fiduciary duty that is not part of the dispute being settled by the agreement in question. The courts below have answered this question in the negative and no other federal court of appeals has issued a decision that reaches a contrary result. The prohibition against such releases is so plainly stated in 29 U.S.C. § 1110(a) that the dispute does not warrant settlement by this Court.

The courts below correctly ruled that 29 U.S.C. § 1110(a) voids the release to the extent that it purports to release the Plan's fiduciaries from an obligation to pay the reversion over to the Plan's participants rather than to DAVIS. 29 U.S.C. § 1110(a) states as follows:

> Except as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

In the case at bar, ROSENBAUM filed suit under 29 U.S.C. § 1132(a)(2) for DAVIS' breach of fiduciary duty under 29 U.S.C. § 1109. ROSENBAUM alleged that DAVIS, as the Plan administrator, breached its fiduciary duty by paying the surplus assets to DAVIS, the employer, rather than to the Plan's participants.

DAVIS argues that 29 U.S.C. § 1110(a) does not apply to the case at bar because DAVIS could have returned the reversion to the Plan and still refused to pay ROSENBAUM his proportionate share on the basis of the release. DAVIS assumes that such a refusal could not be a breach

of fiduciary duty under part 4 of Subtitle B of ERISA, and thus the release would not be void under 29 U.S.C. § 1110(a). See *Sulit, Inc.* v. *Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988).

DAVIS' assumption is erroneous because 29 U.S.C. § 1104(a)(1)(A)(i) requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries," and under (D), "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of" ERISA. Under this statutory provision, a fiduciary owes a duty directly to plan participants. *Harlan* v. *Sohio Petroleum Co.*, 677 F.Supp. 1021 (N.D. Cal. 1988); *Kann* v. *Keystone Resources, Inc.*, 575 F.Supp. 1084 (W.D. Pa. 1983). If the Plan requires the fiduciary to pay a proportionate share of the surplus assets to ROSENBAUM, as a participant upon termination of the Plan, then DAVIS' failure to do so would be a breach of 29 U.S.C. § 1104(a)(1)(A) and (D). Since 29 U.S.C. § 1104(a)(1)(A) and (D) state a duty which arises under part 4 of Subtitle B of ERISA, liability for a breach of that duty cannot be released by ROSENBAUM.

The Sixth Circuit Court of Appeals effectively distinguished the two cases that DAVIS relied on for its argument that voluntary releases are not void under 29 U.S.C. § 1110(a). The case of *Sulit, Inc.* v. *Dean Witter Reynolds, Inc., supra*, was concerned with an agreement to arbitrate an ERISA claim. The Eighth Circuit ruled that such an agreement was not void under 29 U.S.C. § 1110(a) because it did not purport to relieve a fiduciary for any liability for that claim. It only affected the forum of the dispute. To the contrary, the *Sulit* court affirmed that 29 U.S.C. § 1110(a) will not permit a fiduciary to be relieved of its obligations to the plan.

The unreported decision of the Sixth Circuit in *Miller, et al.* v. *General Motors Corp.*, No. 87-1493 (6th Cir. 1988) involved an agreement which allowed the plaintiffs to purchase GM stock at below-market prices if they released GM from any liability arising out of the transfer of the plaintiffs from GM to EDS. The release covered past and present claims of the employees. The Sixth Circuit ruled that 29 U.S.C. § 1110(a) did not bar the release because the statute only applied to fiduciary duties owed to the pension plan and not to employment agreements.

ROSENBAUM does not argue, nor did the lower courts hold, that the release given in the November 1, 1985 Agreement was not effective as to the disputed claim resolved by that Agreement. The parties had a dispute over the amount of ROSENBAUM's accrued benefit and that dispute was settled by a compromise. ROSENBAUM could not now come into court and demand that the dispute be reopened. However, the *only* disputed claim that was the subject of the November 1, 1985 Agreement was the dispute over the accrued benefit. Nowhere in that Agreement (which was drafted by DAVIS' counsel in this appeal) do the parties recite that there is a dispute over the reversion. A simple examination of ¶¶ 8 through 11 of the Agreement details the extent of the dispute (R. 25: Exhibit E, ¶¶ 8-11, pp. 2-3). The claim for the reversion was neither disputed, settled nor released by the Agreement.

For this reason, the decision of the courts below does not conflict with either *Hoffa* v. *Fitzsimmons*, 673 F.2d 1345 (D.C. Cir. 1982) or *Waits* v. *Weller*, 653 F.2d 1288 (9th Cir. 1981). Neither decision involved a breach of fiduciary duty nor a release of liability for such a breach under 29 U.S.C. § 1110(a). Rather, these cases merely affirm that a good faith settlement of a dispute

cannot be reopened in the absence of fraud. In the case at bar, ROSENBAUM does not seek to set aside the compromise reached in the November 1, 1985 Agreement that established the amount of his accrued benefit. However, any release that purports to bar him from pursuing a *future* breach of fiduciary duty by DAVIS is void under 29 U.S.C. § 1110(a).

II.

A COURT IS AUTHORIZED TO GO BEYOND THE BROAD LANGUAGE OF A RELEASE TO DETERMINE ITS FAIRNESS AND THE INTENT OF THE PARTIES IN EXECUTING IT.

ROSENBAUM contends that the issue of interpretation of the release is subsidiary to the first issue presented for review. More importantly, standing alone, an issue of contract interpretation does not warrant review by this Court on a writ of certiorari. Contract interpretation is solely a matter of state law and does not involve a federal question. An alleged conflict between a federal court of appeals and a state court of last resort on a non-federal question is not one of the reasons for granting review under Supreme Court Rule 17.1

The significance of the issue raised by DAVIS is further diminished by the fact that the Sixth Circuit did not need to reach the issue of interpretation. Both courts below held that 29 U.S.C. § 1110(a) prohibited the enforceability of the release. Therefore, if this Court does not accept DAVIS' first issue as sufficient grounds to merit review, the release will be deemed unenforceable, regardless of whether the lower courts acted properly in interpreting the release.

With regard to the merits of DAVIS' argument, the law of releases in Michigan clearly authorizes the inquiry which the courts below conducted into the scope

of the release. Even where the language of a release is clear and unambiguous, a court is authorized to go beyond the broad language of a release to determine the fairness of a release and the intent of the parties in executing it. *Denton* v. *Utley*, 350 Mich. 332, 86 N.W.2d 537 (1957); *Harris* v. *Lapeer Public School System*, 114 Mich. App. 107, 318 N.W.2d 621 (1982); *Auto-Owners Insurance Co.* v. *Higby*, 57 Mich. App. 604, 226 N.W.2d 580 (1975).

In the case at bar, the Sixth Circuit determined from the circumstances surrounding the execution of the release that ROSENBAUM did not intend to release his claim to a share of the reversion. The Court relied on the fact that as of the date the release was executed, DAVIS had not claimed the reversion for itself, nor had even calculated the extent of such reversion. In addition, under the terms of the Plan then in effect, and considering that the release pre-dated the Sixth Circuit's decision in *Bryant* v. *International Fruit Products Company, Inc., supra*, the courts below properly concluded that ROSENBAUM did not even believe that he had a claim to the reversion at the time that he executed the release.

III.

THE ADEQUACY OF CONSIDERATION SUPPORTING A CONTRACT IS STRICTLY A MATTER OF STATE CONTRACTUAL LAW AND IS NOT OF SUCH CHARACTER AS TO WARRANT A REVIEW ON WRIT OF CERTIORARI BY THE UNITED STATES SUPREME COURT.

Like question II, the issue presented by question III is subsidiary to question I, and is strictly a matter of state contractual law. For the same reasons cited in opposition to question II, this issue is not significant under Supreme Court Rule 17.1, nor would this Court even

need to address it if a review on a writ of certiorari is not granted on question I. In addition, the Sixth Circuit did not even rely on a failure of consideration as a grounds for invalidating the release.

IV.

A RETIRED PARTICIPANT OF A DEFINED BENEFIT PENSION PLAN, WHOSE VESTED BENEFIT HAS NOT BEEN DISTRIBUTED TO HIM IS ENTITLED TO SHARE IN SURPLUS PLAN ASSETS UPON SUBSEQUENT PLAN TERMINATION.

DAVIS argues that ROSENBAUM does not have standing to maintain his lawsuit under 29 U.S.C. § 1132(a). DAVIS contends that ROSENBAUM should be deemed to have constructively received his accrued benefits when, after his retirement, he segregated the lump-sum equivalent of his accrued benefit into a self-directed trust account within the Plan itself. Consequently, this "constructive receipt" of benefits would take ROSENBAUM out of the definition of "participant" set forth in 29 U.S.C. § 1002(7). DAVIS further argues that unless ROSENBAUM is deemed to have received his accrued benefit when the Plan segregated his benefit into a self-directed account, such segregated accounts will allow retired employees to "indefinitely" defer federal income taxation on their benefits.

In order for ROSENBAUM to maintain his action against DAVIS under 29 U.S.C. § 1132(a), he must meet the statutory definition of "participant" as set forth in 29 U.S.C. § 1002(7):

> The term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit

> plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

In an effort to disqualify ROSENBAUM under the above definition, DAVIS argues that ROSENBAUM was not eligible to receive a benefit from the Plan when it terminated.

As the Sixth Circuit stated, DAVIS had not, in fact, actually distributed benefits to ROSENBAUM before the Plan terminated. Thus, DAVIS is forced to argue that ROSENBAUM should be deemed to have constructively received his benefits. Were this the case, DAVIS argues, ROSENBAUM would not be considered a participant under the "lump-sum" rule set forth in *Kuntz* v. *Reese*, 785 F.2d 1410 (9th Cir. 1986).

ERISA contains no provision for constructive receipt of pension benefits. DAVIS must resort to the Internal Revenue Code which provides rules for taxation of pension benefits upon receipt. Unfortunately for DAVIS, 26 U.S.C. § 402(a)(1) provides that pension benefits are taxable to the distributee when *actually distributed*. In an effort to eliminate ROSENBAUM as a participant, DAVIS argues that the segregated asset account into which ROSENBAUM placed his pension benefits was not permitted under the Code. Therefore, states DAVIS, ROSENBAUM is deemed to have received his benefit when the segregated asset account was created in 1984.

DAVIS is plain wrong when it states that in a segregated asset account, an early retiree's benefits are deferred from taxation indefinitely. Such an arrangement would clearly violate 26 U.S.C. § 401(a)(14), which requires that benefits be distributed at the earlier of age 65 or normal retirement age. Nowhere in the segregated asset amendment does DAVIS eliminate this statutory

requirement (R. 47: Exhibit 6, pp. 12-13). The Plan itself clearly requires ROSENBAUM, as an early retiree, to start receiving his benefits not later than his normal retirement age (R. 25: Exhibit B, § 12.1).[1]

DAVIS argues that ROSENBAUM never elected a commencement date to begin receiving benefits under the early retirement section of the Plan. If so, then the administrator of the Plan, DAVIS, would have had to begin making distributions to ROSENBAUM when he reached age 65, in order to comply with ERISA. ROSENBAUM would then have had to pay taxes on his benefits upon distribution. The segregated asset account created no "loophole" through which ROSENBAUM or any other early retiree could defer taxation or benefits indefinitely. The amendment did nothing more than what it was designed to do: permit an early retiree to direct the investment of his assets in a pension plan until such time as he either chose to withdraw his benefits, or was forced to withdraw them when he reached age 65.

The concept of remaining a participant while deferring benefits is consistent with 29 U.S.C. § 1002(7) as well as with the Internal Revenue Code. That is why DAVIS identified ROSENBAUM as a "separated participant with deferred pension benefits" in its filings with the Social Security Administration after ROSENBAUM retired (R. 50: Reply Brief, Exhibit A). ERISA-qualified plans permit participants to defer benefits. ROSENBAUM merely adopted another form of deferral.

Even if ROSENBAUM had actually received his vested benefits in 1984, he would still be considered a participant for purposes of seeking a share of the surplus

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[1] In this case, ROSENBAUM's normal retirement age is age 65, which age he did not reach before the Plan was terminated in 1985 (R. 25: Exhibit B, § 2.22).

assets. In *Amalgamated Clothing and Textile Workers Union AFL-CIO, et al.* v. *Murdock*, 861 F.2d 1406 (9th Cir. 1988), the Ninth Circuit distinguished its own decision in *Kuntz* between a former employee that seeks benefits under the plan and one that seeks monetary damages for breach of fiduciary duty. The Sixth Circuit agreed that the *Kuntz* rule only disqualifies a former employee who seeks monetary damages. Where a former employee seeks to recover a benefit that is payable by the plan, he is considered to be "eligible to receive a benefit" under 29 U.S.C. § 1002(7).

This Court's decision in *Firestone Tire and Rubber Co.* v. *Bruch*, __ U.S. __, 109 S.Ct. 948 (1989), supports this important distinction. This Court stated that:

> In order to establish that he 'may become eligible for benefits', a claimant must have a colorable claim that (1) he will prevail in a suit for benefits . . . *Firestone, supra* at 958.

In the case at bar, the Sixth Circuit determined that ROSENBAUM had a colorable claim that he would prevail in a suit to recover the reversion for the Plan's participants.

DAVIS attempts to limit *Firestone* to claims for "vested benefits" only, arguing that surplus assets are not vested benefits under *Chait* v. *Bernstein*, 835 F.2d 1017 (3rd Cir. 1988). However, 29 U.S.C. § 1002(7) bases eligibility on a "benefit of any type." It is not restricted to vested benefits. In *Chait*, the Third Circuit merely noted that 26 U.S.C. § 411(d)(3), which makes certain accrued benefits nonforfeitable to the employees, does not extend to surplus assets.[2] There is no suggestion

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[2] This is not surprising, considering that 29 U.S.C. § 1344(d)(1) permits surplus assets to revert to employers if not prohibited by the plan.

that if a plan required that surplus assets be distributed to the employees on termination of the plan, such assets would not be considered a "benefit" under the plan.

In the case at bar, the Sixth Circuit held that the Plan required that DAVIS distribute the surplus assets to the participants. Although the surplus is not a vested benefit, it is a type of benefit under the Plan. Thus, a former employee's colorable claim to such benefits makes him a participant under *Firestone* and 29 U.S.C. § 1002(7). As the Sixth Circuit noted, any other ruling would effectively allow plan administrators to insulate surplus assets from the claims of participants by paying out actuarially vested benefits and representing that no further benefits were payable. As in *Amalgamated*, the courts will recognize a class of "equitably-vested" benefits for which suits can be maintained under 29 U.S.C. § 1132(a).

V.

BRYANT v. *INTERNATIONAL FRUIT PRODUCTS COMPANY, INC.*, RETROACTIVELY APPLIES TO REVERSIONS OCCURRING PRIOR TO THAT DECISION.

The issue raised by DAVIS with regard to the retroactive application of *Bryant* was never raised in the Sixth Circuit, nor in the District Court. This Court has held that a question not raised in the lower courts is not open in a proceeding on a petition for certiorari. *Ellis* v. *Dixon*, 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231 (1955), *reh denied* 350 U.S. 855, 76 S.Ct. 37, 100 L.Ed. 759.

The first factor that must be met in determining whether a civil decision is to be applied retroactively is whether the decision represents a clear break with past

law. *Smith* v. *General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984). *Bryant* did not break with past law, but merely applied 29 U.S.C. § 1344(d)(1) to the pension plan involved therein. *Bryant* does not purport to disagree with the earlier decisions of *In re C. D. Moyer Pension Trust*, 441 F.Supp. 1128 (E.D. Pa. 1977), *aff'd without opinion* 582 F.2d 1273 (3rd Cir. 1978), and *Washington-Baltimore Newspaper Guild* v. *Washington Star Co.*, 555 F.Supp. 257 (D.D.C. 1983), *aff'd without opinion* 729 F.2d 863 (D.C. Cir. 1984). Rather, *Bryant* distinguishes the plans involved in those cases from the plan before it. There is nothing in the *Bryant* decision that indicates that the Court is breaking with past law. An indication of such is that the Sixth Circuit did not hesitate to turn the reversion over to the employees in *Bryant*, although no prior decisions in the Circuit had addressed the issue.

Nowhere in its decision does the court below state that *Bryant* "created new law" as DAVIS so boldly claims. The Sixth Circuit did acknowledge that "for the first time" *Bryant* held an amendment like the one in the case at bar to be void. However, that was only because nobody had challenged such amendments prior to *Bryant*. Past law did not sanction DAVIS' actions. *Bryant* did not change the law in place. Clearly, the Sixth Circuit was correct in applying *Bryant* to the facts before it.

VI.

PETITIONER'S PENSION PLAN IS CONTROLLED BY *BRYANT* v. *INTERNATIONAL FRUIT PRODUCTS COMPANY, INC.*, RATHER THAN BY *IN RE C.D. MOYER COMPANY TRUST FUND* OR *WILSON* v. *BLUEFIELD SUPPLY COMPANY.*

DAVIS would have this Court believe that the Third, Fourth, Sixth and District of Columbia Circuits are in

conflict over the issue of whether surplus assets are to be returned to the employer or employees upon termination of a pension plan. In fact, there is no conflict between the Circuits because, as stated in *Bryant*, "each case of this kind is controlled by the language of the documents creating the particular plan involved." *Bryant, supra,* at 123.

DAVIS received the surplus assets from the Plan because the 1979 Restated Plan provided for a reversion in ¶ 22.2(E). ROSENBAUM, as a participant in the Plan, argued that under *Bryant*, DAVIS was not permitted to amend the Original Plan in 1979 to provide for a return of the reversion to the employer.

The Original Plan permitted amendments to the Plan with certain exceptions, as set forth in Article XII entitled "AMENDMENT AND TERMINATION":

> 12.1 The Employer by action of its Board of Directors may amend this trust at any time, or from time to time, as evidenced by an instrument in writing executed in the name of the Employer by a duly authorized officer under the corporate seal of the Employer, provided, however:
>
> * * *
>
> (c) No funds contributed to this trust nor assets of the trust shall ever revert to or be made available to the employer. (R. 25: Exhibit A, p. 28).

Clearly, the Original Plan did not allow DAVIS to amend the Plan to permit surplus assets to revert to the employer on termination. The issue of law before the Sixth Circuit was whether DAVIS properly amended the Plan in 1979 to provide for the reversion to it of surplus assets.

This case is controlled by the Sixth Circuit's decision in *Bryant* because the *Bryant* case is factually on point. In *Bryant*, the employer created a defined benefit plan in 1959 which was qualified under 26 U.S.C. § 401(a)(2). The 1959 plan contained the following prohibition against reversions to the employers:

> Section 5.3 In no event and under no circumstances shall any contributions to this Trust by the Employer, nor any of the Trust Estate or the income therefrom, revert to or be repaid to the Employer; and all amounts paid by the Employer to the Trustees shall be used and applied for the sole and exclusive benefit of the participants under this Trust or their beneficiaries or estates. *Bryant, id* at 120.

In 1976, the employer amended and restated the plan to conform with ERISA. The anti-reversion sections of the 1959 plan were omitted. In 1982, the plan was amended again to provide that any excess assets remaining as a result of actuarial error would be returned to the employer. The plan was thereupon terminated. $61,000.00 was distributed to the participants and $139,000.00 was returned to the employer.

The plaintiffs were all participants in the plan when it was terminated. They sought a distribution of the excess assets to themselves. The district court ruled in favor of the employer. On appeal, the Sixth Circuit reversed the lower court and ruled in favor of the participants.

The Sixth Circuit relied principally on the language in ¶ 5.3 of the 1959 plan that prohibited any reversion to the employer. The Court concluded that such prohibition was more explicit than in the earlier cited cases.

Since the surplus assets originated as contributions, they could not revert to the employer. The Sixth Circuit remanded the case back to district court to fashion an equitable allocation of the excess funds among the participants.

Bryant controls this issue in the case at bar. The Original Plan assures the participants that once contributed, no money paid into the fund can ever be reclaimed by the employer (R. 25: Exhibit A, ¶ 12.1(c), p. 28). As in *Bryant*, the language in 12.1(c) is absolute:

> *No funds contributed* to the trust *nor assets* of the trust *shall ever revert to* or be made available to *the Employer.*

This language precludes the amendment that was adopted in 1979 to provide for a reversion of funds to DAVIS. As the Sixth Circuit noted, it does not matter how the surplus was created, because the surplus did originate as contributions.

In *Bryant*, the Sixth Circuit distinguished the two district court cases that were relied on by the employer. The Court noted that neither the *Moyer* nor *Washington Star* plans contained language similar to that found in ¶ 5.3 of the *Bryant* plan. In addition, *Moyer* and *Washington Star* both involved pension plans that made no provisions for the allocation of excess assets among the participants upon the termination of the plan. Thus, the respective district courts did not feel obligated to reward the participants with more moneys than would have otherwise been received as defined benefits.

In the case at bar, the Original Plan does provide that on termination, excess assets are to be distributed to the participants:

> 12.4 Upon termination of the trust any assets of the trust, other than contracts issued on the lives of the participants, shall be distributed among the then participants in proportion to the attained cash values upon contracts then outstanding on the lives of such participants. (R. 25: Exhibit A, ¶ 12.4, pp. 29-30).

Thus, the feature that distinguished *Bryant* from *Moyer* and *Washington Star* is just as prevalent in the case at bar.

DAVIS' reliance on the absence of the prefatory "No amendment shall" language from ¶ 12.1(c) of the Original Plan is much ado about nothing. As the trial court noted, the entire article is entitled "Amendment and Termination." Paragraph 12.1 opens with a general paragraph permitting plan amendments, subject, however, to four stated exceptions. Subparagraphs (a), (b), and (d) prohibit a certain type of amendment. Subparagraph (c) contains a prohibition against reversions to the employer. The fact that subparagraph (c) is included with three other prohibited types of amendments is sufficient to conclude that amendments permitting reversions are likewise prohibited. Furthermore, DAVIS cannot accomplish by an amendment what it is expressly prohibited from doing by deleting the prohibition first. *Bryant, supra* at 123.

The courts below also adequately distinguished the decision in *Wilson* v. *Bluefield Supply Co.*, 819 F.2d 457 (4th Cir. 1987). Quite simply, the lower courts used the same basis that the Fourth Circuit used to distinguish *Wilson* from *Bryant*. The non-reversion provision in *Bryant* barred repayment to the employer of "contributions." The nondiversion provision in *Wilson* barred a withdrawal or transfer from the "Fund." The Fourth

Circuit noted that the *Moyer* plan also made "no reference to the return of contributions." The Fourth Circuit then held that *based on a reading of the Wilson plan*, the term "Fund" did not encompass residual assets. Therefore, a reversion of surplus assets was not prohibited by the *Wilson* plan.

The lower courts correctly held that the Original Plan in the case at bar was more like the *Bryant* plan than the plan in *Wilson*. The Original Plan prohibits a reversion of "funds contributed," as opposed to a withdrawal from the "Fund." There can be no question that the Original Plan's prohibition encompasses surplus assets as well as accrued benefits since ¶ 12.1(c) uses both of the terms "funds contributed" and "assets of the trust."

DAVIS also argues that the Plan gives the Administrator the power to interpret and construe provisions of the Plan and that DAVIS interpreted the Plan to permit the amendment that resulted in the employer being entitled to keep the reversion on termination (R. 25: Exhibit B, §§ 3.5 and 7.4). DAVIS argues that its decision as Administrator was not arbitrary and capricious and must be upheld by the courts even if another interpretation is reasonable.

The arbitrary and capricious standard relied upon by DAVIS is narrower than DAVIS would have it appear. The Plan itself requires that DAVIS' interpretation be consistent with the intent of the Plan and shall comply with the terms of ERISA (R. 25: Exhibit B, § 3.5(A)).

In this Court's recent decision in *Firestone*, the arbitrary and capricious standard was examined with reference to denial of benefit actions under 29 U.S.C. § 1132 (a)(1)(B). This Court concluded that a denial of benefits under this statute is to be reviewed under a *de novo* standard unless the plan gives the administrator discre-

tionary authority to determine eligibility for benefits or to construe the terms of the plan.

While not made applicable to breach of fiduciary duty actions under 29 U.S.C. § 1132(a)(2), the principles behind *Firestone* seriously weaken the applicability of the arbitrary and capricious standard to other ERISA actions. This Court rejected the rationale behind applying the same standards of judicial review found in the Labor Management Relations Act to ERISA. Yet those standards are the source of the arbitrary and capricious standard as applied to breaches of fiduciary duty. *Gordon* v. *ILWU-PMA Benefit Funds*, 616 F.2d 433 (9th Cir. 1980). There would appear to be no rational reason for distinguishing between the standard of review to be applied to actions arising under either 29 U.S.C. § 1132(a)(1)(B) or § 1132(a)(2).

Nowhere in the Plan at bar does the Plan use the term "discretionary" with regard to the Administrator's duties. In the absence of such discretion, *Firestone* would suggest that a *de novo* standard of review would apply. Yet even where such discretion can be gleaned, *Firestone* cautions that if a fiduciary is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there has been an abuse of discretion.

In the case at bar, DAVIS, as Administrator, interpreted the Plan in such a manner that provided a windfall for DAVIS, the employer. Such a conflict of interest was clearly a factor in DAVIS' interpretation of the Plan. Even under the arbitrary and capricious standard, the courts below were entitled to take this conflict into account when they determined that DAVIS' interpretation of the Plan was not reasonable under the term of the Original Plan or ERISA.

This Court had the opportunity to review *Bryant* on a writ of certiorari and chose not to do so. The courts below have not deviated from *Bryant* and the Plan in the case at bar falls squarely within *Bryant*. There is no conflict between the Circuits as to the law to be applied. Only differences in plan language have dictated the different results. For these reasons, ROSENBAUM submits that the courts below properly held that the reversion amendment was void and that the reversion belonged to the participants of the Plan.

VII.

WHEN A DEFINED BENEFIT PENSION PLAN IS JUDICIALLY DETERMINED TO HAVE BEEN IMPERMISSIBLY AMENDED TO PERMIT A DISTRIBUTION OF SURPLUS ASSETS UPON PLAN TERMINATION TO THE EMPLOYER RATHER THAN TO PARTICIPANTS, THE PLAN'S PRE-AMENDMENT DEFINITION OF "PARTICIPANT" DOES NOT CONTROL THE ALLOCATION OF SURPLUS ASSETS TO THE PARTICIPANTS.

DAVIS' final argument claims that ROSENBAUM should not be entitled to share in the reversion of assets because he is not a participant as defined by the Original Plan. DAVIS' argument contains at least one faulty premise; the belief that the courts below "re-instated" the allocation provisions of the Original Plan when the reversion amendment of the Restated Plan was nullified. This did not occur.

When the District Court below nullified the reversion amendment, the Restated Plan no longer provided for a reversion to the employer. The Plan was now silent on what to do with the reversion. The District Court properly looked to the regulations enacted to interpret 29 U.S.C. § 1344(d)(1). 29 C.F.R. § 2618.30 provides that if residual assets do not revert to the

employer, then they *shall* be allocated in accordance with 29 C.F.R. § 2618.32(a). This regulation allocates the residiual assets among a "pool of eligible participants." The individuals comprising that pool are essentially the plan participants who received a distribution of their accrued benefits on the date that the Plan's assets were distributed. 29 C.F.R. § 2618.2. Since ROSENBAUM was one of the participants who received payment of his accrued benefits on the date that the Plan's assets were distributed, he is entitled to share in the allocation of the residual assets under the formula set forth in 29 C.F.R. § 2618.32(a).

The trial court did not rely on the definition of "participant" in the Restated Plan any more than it utilized the method of allocation from the Original Plan. As the Sixth Circuit pointed out in the case below, the remainder of the Restated Plan was left intact and is valid. There would have been no reason to look to the pre-ERISA definition of "participant" as a basis for allocating the residual benefits.[3] This issue was properly decided under ERISA by the courts below and does not merit further review.

CONCLUSION

For the foregoing reasons, Respondent submits that the lower courts properly decided each issue raised by Petitioner. Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari to review the decision of the United States Court of

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[3] In fact, the only reason that the Original Plan excluded retired employees from its definition of "participants" is because, unlike ERISA plans, the Original Plan had no provision for a retired employee to keep his or her benefit in the plan until reaching normal retirement age.

Appeals for the Sixth Circuit which affirmed the judgment of the United States District Court for the Eastern District of Michigan in the amount of $43,832.07 plus costs and prejudgment interest as provided in the judgment.

Respectfully submitted,

GOLDSTEIN, SERLIN, REIZEN,
ROSENBAUM & BAKER, P.C.

By: /s/ BARRY M. ROSENBAUM (P26487)
/s/ JOEL H. SERLIN (P20224)
29566 Northwestern Highway, Suite 300
Southfield, Michigan 48034
(313) 358-1960

Attorneys for Respondent,
IRVING J. ROSENBAUM

Dated: August 15, 1989

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

• • •

APPENDIX A

RELEVANT STATUTORY PROVISIONS

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29 C.F.R. § 2618.2

"Pool of eligible participants and beneficiaries" means —

(a) For a contributory plan that provides for reversion of residual assets to the employer, those individuals entitled to benefits in priority category 2, determined as of the date plan assets are to be distributed; and

(b) For any plan that does not provide for reversion of residual assets to the employer, those individuals entitled to benefits in priority categories 2 through 6, determined as of the date plan assets are to be distributed.

"Priority categories" or "priority category" means the categories contained in sections 4044(a)(1) through (6) of the Act that establish the order in which plan assets are to be allocated.

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29 C.F.R. § 2618.30 Allocation to employer.

(a) Except for residual assets that are attributable to employee contributions, as com-

puted under Sec. 2618.31, residual assets in a plan may revert to the employer if —

(1) The plan provides, as of the date of plan termination, for the return of residual assets to the employer; and

(2) The distribution does not violate any provision of law.

(b) If the requirements of paragraph (a) of this section are not satisfied, residual assets shall be allocated among the pool of eligible participants and beneficiaries in accordance with Sec. 2618.32(a).

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29 C.F.R. § 2618.32. Allocation among the pool of eligible participants and beneficiaries.

(a) *Plans that do not provide for reversion to the employer.* Subject to the provisions of paragraphs (c) of this section, in a plan to which Sec. 2618.30(b) applies, the share of each member of the pool of eligible participants and beneficiaries in the residual assets shall be computed by multiplying total residual assets by a fraction —

(1) The numerator of which is the present value of the member's benefits assigned to priority categories 2 through 6, pursuant to Sec. 2618.12 through Sec. 2618.16; and

(2) The denominator of which is the present value of all benefits assigned to priority categories 2 through 6, pursuant to Sec. 2618.12 through Sec. 2618.16.

Supreme Court, U.S.
FILED
SEP 14 1989

No. 89-92

In The

Supreme Court of the United States

October Term, 1989

DAVIS IRON WORKS, INC.,
Petitioner,

v

IRVING J. ROSENBAUM,
Respondent.

PETITIONER'S REPLY
TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

COLEMAN E. KLEIN, P.C.
By: COLEMAN E. KLEIN (P 16035)
Counsel of Record
3000 Town Center, Suite 2500
Southfield, Michigan 48075
(313) 353-5432

Attorney for Petitioner,
DAVIS IRON WORKS, INC.

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

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No. 89-92

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TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OBJECTIONS TO RESPONDENT'S COUNTER-STATEMENT OF THE CASE

Contrary to Rosenbaum's assertion in his Brief in Opposition, neither Rosenbaum nor any other participant ever made any contributions to the Plan; all contributions were made by Davis. Rosenbaum has heretofore acknowledged that fact below. (Appellee's Brief, p. 1)

Until the recent filing of Rosenbaum's Brief in Opposition, he has never challenged Davis's assertion of his right to indefinitely defer the distribution of the assets held in his segregated account. In fact, Rosenbaum's Complaint (R. 1: ¶ 12) and his Brief in Support of Motion for Summary Judgment (R. 24: p. 6) expressly acknowledged that fact.

The June, 1984 Plan Amendment (R. 47: Exhibit 6) segregating Rosenbaum's accrued benefit merely provided for segregated accounts. It did not purport to address participants' income tax or ERISA standing issues because that was not its function.

Whether Rosenbaum paid taxes in 1985 or at any other time has never been an issue in this case and is wholly outside the record below.

REASONS FOR ALLOWANCE OF THE WRIT

I

Rosenbaum apparently contends that every duty owed by a fiduciary **to the plan** under 29 U.S.C. §§ 1104(a)(1)(A)(i) and (D) implicitly also involves a duty owed to participants, since presumably any breach of a fiduciary's duty to the plan could ultimately adversely affect benefits owed to its participants. His reasoning is flawed since Congress distinguished between a fiduciary's duties **to a plan** (part 4 of Subtitle B of ERISA) and those **to a participant** (part 5 of Subtitle B of ERISA).

The prohibition against releases is found in 29 U.S.C. § 1110(a) which is contained in part 4, not part 5. See, e.g., *Sulit, Inc.* v. *Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988). If Congress had intended to preclude settlements of benefit disputes (such as the one at bar) it would not have limited the prohibition to part 4 duties only.

Rosenbaum acknowledges that 29 U.S.C. § 1110(a) does not bar that portion of the Release relating to his version of the disputed claim resolved by the Agreement. (Brief in Opposition, p. 7) Rosenbaum's remarkable concession is thus fatal to his argument that 29 U.S.C. § 1110(a) bars releases affecting plan benefits since the issue then turns not on the unenforceability

of the Release but rather upon Rosenbaum's subjective interpretation of it. As the Sixth Circuit accurately observed (Petition for Certiorari, Appendix B-9):

> "It would certainly appear, considering the language of the release, that Rosenbaum waived all claims, present and future, as to the trust."

Rosenbaum's citations of *Harlan* v. *Sohio Petroleum Co.*, 677 F.Supp. 1021 (N.D. Cal. 1988) and *Kann* v. *Keystone Resources, Inc.*, 575 F.Supp. 1084 (W.D. Pa. 1983) are inapposite: the plaintiff in *Harlan* never signed a release and *Kann* did not even involve a release.

Rosenbaum's assertion that the Agreement was drafted by Davis's counsel in this appeal fails to acknowledge that Rosenbaum's own counsel in these proceedings discussed and negotiated that Release. The resulting Agreement was not presented to Rosenbaum on a "take-it-or-leave-it" basis.

II

An issue of contract interpretation, although construed by state law, does involve a federal question when it applies to ERISA pension plans. *Landro* v. *Glendenning Motorways, Inc.*, 625 F.2d 1344, 1351 (8th Cir. 1988) observed:

> "The legislative history of [ERISA] demonstrates that in order to fill the gaps left by ERISA's express provisions, Congress intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans, [citations omitted] in much the same way as the federal courts have long fashioned federal common law under Section 301 of the Labor Management Relations Act of 1974."

Rosenbaum does not argue that Michigan contract law cited by Davis differs from federal common law or is not in accord with general contract principles to which the federal courts would look as a source for federal law on the questions involved in this case. *Landro, supra,* at 1352.

The Agreement containing the Release provides that Michigan law shall apply except to the extent that federal law preempts. (R. 25: Exhibit E ¶ 15) Just as *Hoffa* v. *Fitzsimmons,* 673 F.2d 1345, 1358 (D.C. Cir. 1982) applied Michigan contract law to the ERISA release in that case, the instant Agreement should also be governed by Michigan law, since it does not conflict with federal common law.

The following Michigan cases cited by Rosenbaum wherein courts have inquired into the scope of a release are distinguishable. *Denton* v. *Utley,* 350 Mich 332, 86 N.W.2d 537 (1957) and *Harris* v. *Lapeer Public School System,* 114 Mich App 107, 318 N.W.2d 621 (1982) involved either mutual mistake, misrepresentation, fraud or incompetence; the release in *Auto-Owners Insurance Co.* v. *Higby,* 57 Mich App 604, 226 N.W.2d 580 (1975) was limited to the one insurance policy specifically identified therein.

Rosenbaum has made none of the allegations which even his aforesaid Michigan cases would require to upset a release. To the contrary, all he asserts is his unilateral understanding of the Agreement and Release, contrary to the plain and unambiguous language expressed therein.

III

Rosenbaum's assertion that the Sixth Circuit did not even rely on a failure of consideration as a ground for invalidating the Release ignores that Court's statement that "it should be pointed out that Rosenbaum would have

been very foolish to waive a claim to over $50,000.00 for a settlement that netted him about $2,000.00. We hold that the release does not bar this claim." (Petition for Certiorari, Appendix B-11) It is obvious that the Sixth Circuit considered the adequacy of consideration, contrary to Michigan law and *Hoffa, supra*, 673 F.2d at 1360.

IV

At no time prior to Rosenbaum's recently-filed Brief in Opposition did he ever contend that there was any mandatory distribution date affecting his segregated account. In fact, he pleaded just the opposite. (R. 1: ¶ 12; R.24: p. 6.) His dispute of a previously-admitted fact at this stage of the proceedings is untimely and bars him from now asserting it.

The terms of the Plan required participants, upon retirement, to designate their benefit commencement date. The Plan, consistent with ERISA, required that benefits commence not later than age sixty-five. In legal contemplation, the arrangement Rosenbaum made with the trustee when he retired was that Rosenbaum received an immediate lump-sum distribution. It was agreed that the trustee would hold that distribution in Rosenbaum's segregated account in like manner as an independent trustee would have done had Rosenbaum chosen to place it with a bank or brokerage firm; the Trustee was legally obligated to transfer those assets to Rosenbaum whenever he wished. Such an arrangement thus complied with ERISA's mandatory benefit commencement rule, since the distribution was effected upon segregation before his sixty-fifth birthday.

Rosenbaum asserts that "[w]here a former employee seeks to recover a benefit that is payable by the plan, he is considered to be 'eligible to receive a benefit' under 29 U.S.C. § 1002(7)." (Brief in Opposition, p. 13, citing *Amalgamated Clothing and Textile Workers*

Union AFL-CIO, et al v. *Murdock*, 861 F.2d 1406 (9th Cir. 1988)) *Amalgamated* involved an unusual situation, totally distinguishable from the instant case, in which the plan's trustees fraudulently misused their position to self-deal in trust assets. *Amalgamated* did not change the rule in *Kuntz* v. *Reese*, 785 F.2d 1410 (9th Cir. 1986); it simply held " * * * that, for the limited purpose of granting plan participants and beneficiaries standing to sue in cases such as this one, ill-gotten profits held in a constructive trust for plan participants and beneficiaries may be construed as equitably vested benefits under an ERISA plan."

V

Rosenbaum has always contended in the courts below that the Release was ineffective to the extent that it purported to release a cause of action first created by *Bryant* v. *International Fruit Products Company, Inc.*, 793 F.2d 118 (6th Cir. 1986), cert. denied 479 U.S. 986, 107 S.Ct. 576, after he signed the Release, and that he had relied upon the lawfulness of the reversion to Davis at the time of the Release. (R. 24: Brief in Support of Plaintiff's Motion for Summary Judgment, pp. 19-20; Appellee's Brief, pp. 23-24) He now asserts exactly the opposite. (Brief in Opposition, p. 15)

Davis, on the other hand, has consistently argued that *Bryant* applied pre-existing basic contract law principles to the *Bryant* plan and that the law never changed. Davis further argued that, if Rosenbaum was correct, then Davis's receipt of the reversion before *Bryant* was decided was lawful and should now be respected. Implicit in Davis's argument below was that *Bryant* should not be retroactively applied. (R. 47: Brief in Support of Defendant's Response to Plaintiff's Motion for Summary Judgment, p. 25; Appellant's Brief, pp. 21, 33-34; Appellant's Reply Brief, pp. 13-14) Both of the courts below agreed with Rosenbaum that *Bryant*

created new law. (Petition for Certiorari, Appendix B-11; C-14, 20)

Chevron Oil Company v. *Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) considers three separate factors in determining whether a decision is to be applied non-retroactively: (1) whether it establishes a new principle of law or decides an issue of first impression whose resolution was not clearly foreshadowed; (2) whether retrospective operation will further or retard its operation after weighing the merits and demerits in each case; and (3) whether an inequity will be imposed by retroactive application. 404 U.S. at 106-107. The Sixth Circuit below failed to consider those factors when it held that the 1985 reversion to Davis pursuant to a 1984 plan termination was unlawful notwithstanding the fact that those events preceded its 1986 *Bryant* decision.

It is fundamentally wrong, not merely inequitable, to penalize one for committing a lawful act.

VI

Rosenbaum contends that Davis, as Administrator, lacked discretion to administer the Plan. It is remarkable that he advances that contention in light of the following Plan language (R. 25: Exhibit B):

> "3.5(A) * * * The Administrator * * * shall interpret the plan and determine all questions arising in the administration * * * . Any such determinations * * * shall be conclusive and binding upon all persons. On all matters and questions * * * the decision of the Administrator shall govern and control. * * * The Administrator may * * * reconcile any inconsistency * * * as shall be deemed * * * advisable * * * , consistent with the intent that the Plan shall continue to be * * * qualified * * * and shall comply with ERISA * * * ."

See, also, Plan section 7.4: (" * * * the Administrator shall have the power to construe this Agreement * * * in such manner and to such extent as the Administrator shall deem proper to effectuate this Agreement * * * "); and section 26.4(f): ("The decision of the Administrator on review is final.").

Firestone Tire & Rubber Co. v. *Bruch*, ___ U.S. ___, 109 S.Ct. 948, 103 L.Ed.2d. 80 (1989) clearly considers the administrator's authority under the Davis Plan as discretionary. Davis's plan administrator's actions must therefore be reviewed under *Firestone*'s "arbitrary and capricious" standard.

Rosenbaum contends that Davis, as administrator, had a conflict of interest, since Davis stood to gain by receiving the reversion, and that a "de novo" standard of review should be applied. Even assuming, *arguendo*, that is true, the conflict did not extend to the administrator's interpretation that Rosenbaum was not a participant under the Plan's definition thereof at the time of Plan termination and that he had no right to share in the reversion with the other then-participants. The Sixth Circuit should have deferred to the administrator on those issues.

VII

29 C.F.R. § 2618.2(b) provides, in pertinent part:

> "'Pool of eligible participants and beneficiaries' means —
>
> * * *
>
> "(b) For any plan that does not provide for reversion of residual assets to the employer, those individuals entitled to benefits in priority categories 2 through 6, determined as of the date plan assets are to be distributed.
>
> "'Priority categories' or 'priority category' means the categories contained in sections 4044

> (a)(1) through (6) of the Act that establish the order in which plan assets are to be allocated."

ERISA sections 4044(a)(1) through (6) refer to plan benefits. Neither 29 C.F.R. § 2618.2 nor ERISA section 4044(a) defines "benefits under the plan." Plan benefits do not extend to surplus assets upon plan termination after vested benefits are **provided for**. *Chait* v. *Bernstein*, 835 F.2d 1017, 1021, 1022 (3rd Cir. 1988); *Blessitt* v. *Dixie Engine*, 848 F.2d 1164, 1173 (11th Cir. 1988, en banc). Irrespective of whether the segregated account constituted actual payment of Rosenbaum's vested benefit, there is certainly no dispute that it absolutely **provided for** that payment. Rosenbaum is thus not within the "pool of eligible participants."

Furthermore, it is the **Plan** that defines those individuals referred to in the regulations who are entitled to benefits. Original Plan Section 12.4 identified those eligible individuals as the "**then participants.**" (R. 25: Exhibit A) Davis contends that Rosenbaum had retired and had received all of his benefits determined under the Plan's formula before the Plan terminated and was therefore not a "then participant." If there was any doubt, Original Plan Section 1.4 removed it, since it expressly provided that retired employees shall not be considered participants in any event. (R. 25: Exhibit A)

Firestone Tire & Rubber Co., supra, 109 S.Ct. at 957-958, interpreted the term "participant" as found in 29 U.S.C. § 1002(7) as:

> " * * * either 'employees in, or reasonably expected to be in, currently covered employment,' * * * or former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to **vested** benefits, *Kuntz* v. *Reese*, 785 F.2d 1410, 1411 (CA9) (per curiam), cert. denied, 479 U.S. 916 (1986). In order to establish that he 'may

> become eligible for benefits,' a claimant must have a colorable claim that (1) he will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future. * * * A former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to **vested** benefits, however, simply does not fit within the [phrase] 'may become eligible.'" (emphasis added)

It is undisputed that Rosenbaum was a former employee who had retired with no expectation of returning to Davis's employ. His alleged claim is to a portion of the reversion, which, even if considered a benefit, is not a **vested** benefit.

The Sixth Circuit apparently ignored *Firestone Tire & Rubber Co.*'s definition of "participant" and refused to reinstate the Original Plan's definition. By adopting the Amended Plan's definition of "participant" for reversion purposes, under circumstances where the Amended Plan provided for a reversion to the employer, it perverted the clearly-expressed intent of both Plans.

CONCLUSION

Petitioner submits that the courts below improperly decided each issue raised in its Petition for a Writ of Certiorari. Petitioner respectfully requests that this Honorable Court now review the decision of the United States Court of Appeals for the Sixth Circuit affecting the issues presented in its Petition for a Writ of Certiorari.

Respectfully submitted,

By: /s/ COLEMAN E. KLEIN (P16035)
Counsel for Petitioner
Member of the United States
and Michigan Supreme Court Bars
3000 Town Center, Suite 2500
Southfield, MI 48075 (313) 353-5432

Dated:
9/14/89